# FEDERAL JUDICIAL SALARY CONTROL ACT OF 1981

## HEARING

BEFORE THE

## SUBCOMMITTEES ON COURTS AND AGENCY ADMINISTRATION

OF THE

## COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

SECOND SESSION

ON

**S. 1847**

A BILL TO REQUIRE AN ANNUAL AUTHORIZATION FOR THE FEDERAL COURT SYSTEM EXCLUDING THE SUPREME COURT

---

FEBRUARY 25, 1982

---

**Serial No. J-97-98**

---

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
91-266 O WASHINGTON : 1982

S521-91

## COMMITTEE ON THE JUDICIARY

STROM THURMOND, South Carolina, *Chairman*

CHARLES McC. MATHIAS, Jr., Maryland
PAUL LAXALT, Nevada
ORRIN G. HATCH, Utah
ROBERT DOLE, Kansas
ALAN K. SIMPSON, Wyoming
JOHN P. EAST, North Carolina
CHARLES E. GRASSLEY, Iowa
JEREMIAH DENTON, Alabama
ARLEN SPECTER, Pennsylvania

JOSEPH R. BIDEN, Jr., Delaware
EDWARD M. KENNEDY, Massachusetts
ROBERT C. BYRD, West Virginia
HOWARD M. METZENBAUM, Ohio
DENNIS DeCONCINI, Arizona
PATRICK J. LEAHY, Vermont
MAX BAUCUS, Montana
HOWELL HEFLIN, Alabama

VINTON DeVANE LIDE, *Chief Counsel*
QUENTIN CROMMELIN, Jr., *Staff Director*

---

### SUBCOMMITTEE ON COURTS

ROBERT DOLE, Kansas, *Chairman*

STROM THURMOND, South Carolina
ALAN K. SIMPSON, Wyoming
JOHN P. EAST, North Carolina

HOWELL HEFLIN, Alabama
MAX BAUCUS, Montana

RICHARD W. VELDE, *Chief Counsel and Staff Director*
ARTHUR BRISKMAN, *Minority Counsel*

---

### SUBCOMMITTEE ON AGENCY ADMINISTRATION

CHARLES E. GRASSLEY, Iowa, *Chairman*

PAUL LAXALT, Nevada
ARLEN SPECTER, Pennsylvania

HOWARD M. METZENBAUM, Ohio
MAX BAUCUS, Montana

JOHN MAXWELL, *Chief Counsel and Staff Director*
HERMAN SCHWARTZ, *Minority Counsel*

# CONTENTS

## STATEMENTS OF COMMITTEE MEMBERS


| | Page |
|---|---|
| Dole, Hon. Robert, a U.S. Senator from the State of Kansas | 13 |
| Grassley, Hon. Charles E., a U.S. Senator from the State of Iowa | 1 |
| Baucus, Hon. Max, a U.S. Senator from the State of Montana | 17 |


## CHRONOLOGICAL LIST OF WITNESSES


| | |
|---|---|
| Hunter, Hon. Elmo, U.S. district court judge, Western District of Missouri (on behalf of the Judicial Conference), accompanied by Hon. Robert Bork, U.S. District Court of Appeals, District of Columbia; William Weller, legislative affairs officer, Administrative Office; and Dewey Heising, Chief, Financial Management Division, Administrative Office | 6 |
| Brachtl, Henry, accompanied by Lionel Hest, Association of the Bar of the City of New York | 101 |
| Kamenar, Paul, director of litigation, Washington Legal Foundation, accompanied by Prof. Kenneth M. Holland, Department of Political Science, University of Vermont, and Edward H. Dowd, director of research, National Legal Center for the Public Interest | 117 |


## ALPHABETICAL LISTING AND MATERIALS SUBMITTED


| | |
|---|---|
| Dole, Chairman Robert: | |
| Opening statement | 13 |
| Excerpt of H.J. Res. 370 | 105 |
| Bork, Robert: | |
| Testimony | 6 |
| Prepared statement | 74 |
| Appendix: "The Needs of the Federal Courts," report of the Department of Justice Committee on Revision of the Federal Judicial System, January 1977 | 79 |
| Brachtl, Henry: | |
| Testimony | 101 |
| Statement of the Committee on Federal Courts of the Association of the Bar of the City of New York | 107 |
| Dowd, Edward H.: | |
| Testimony | 117 |
| Prepared statement | 147 |
| Heising, Dewey: Testimony | 6 |
| Helms, Senator Jesse: Prepared statement | 3 |
| Hest, Lionel: Testimony | 101 |
| Holland, Kenneth M.: | |
| Testimony | 117 |
| Prepared statement | 133 |
| Supplement to statement | 142 |
| Hunter, Elmo: | |
| Testimony | 6 |
| Response to Senator Grassley's question | 19 |
| Prepared statement | 27 |
| Appendix A: Judicial Conference Committees as of October 1, 1981 | 43 |
| Appendix B: Budget authority for all agencies, legislative branch and judicial branch | 51 |
| Appendix C: Statement before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, U.S. House of Representatives, May 6, 1981 | 52 |

Page

Kamenar, Paul:
Testimony ..... 117
Prepared statement ..... 125
Weller, William: Testimony ..... 6

## APPENDIX

### Proposed Legislation

S. 1847, text of bill ..... 155

### Additional Submissions

Congressional Research Service: Telephone Survey of State court administration officials regarding authorization of the State judicial budget and the method used to provide for judicial salary increases ..... 158
Letters from—
David R. Brink, American Bar Association, to Senator Robert Dole and Senator Charles E. Grassley ..... 170
Edward H. Dowd, Director of Legal Research, National Legal Center for the Public Interest, to Senator Charles E. Grassley ..... 172
Henry A. Brachtl and Lionel G. Hest, the Association of the Bar of the City of New York, to Senator Robert Dole and Senator Charles E. Grassley ..... 174
Responses to Senator Thurmond's questions from—
Judge Elmo Hunter ..... 179
Judge Robert Bork ..... 181

# FEDERAL JUDICIAL SALARY CONTROL ACT OF 1981

THURSDAY, FEBRUARY 25, 1982

U.S. SENATE,
SUBCOMMITTEES ON COURTS AND AGENCY ADMINISTRATION,
COMMITTEE ON THE JUDICIARY,
*Washington, D.C.*

The subcommittees met, pursuant to recess, at 9:37 a.m., in room 2221, Dirksen Senate Office Building, Hon. Robert J. Dole (chairman of the Subcommittee on Courts) presiding.

Present: Senators Grassley and Baucus.

Staff present: Richard W. Velde, counsel; Sheila Bair, counsel; Doug Comer, counsel; Kevin Manson, counsel; Ally Milder, counsel; John Maxwell, counsel; Patricia Brown, chief clerk; and Susie Shirk, chief clerk.

## OPENING STATEMENT OF SENATOR CHARLES E. GRASSLEY

Senator GRASSLEY. I call this hearing to order. Senator Dole normally would chair this hearing because of his obvious seniority and chairmanship of the Subcommittee on Courts, but because of joint referral, I am also here as a chairman of the Agency Administration Subcommittee, so I will begin the hearing.

As you may know, the Senate was in session last night until 1:20 so our attendance by members of these two subcommittees could be understandably sparse.

Senator Dole urged me to go ahead; he will be along shortly. I know that he has an opening statement. Whatever witnesses are at the table when he comes will stop so we can let Senator Dole give his opening testimony.

I want to welcome each of our distinguished witnesses and thank them for appearing before us today as we begin examination of S. 1847,[1] the Federal Judicial Salary Control Act of 1981.

I would hope that we could resolve this issue which I believe is important not only to the legislative, executive, and judicial branches but to the general public as well.

We are all aware of the fact that the citizens of this Nation are extremely concerned about the budgetary policies of their Government. These are austere times, and I believe that in light of the performance record of past Congresses, their concern is justified.

I personally have pledged to take what measures I can to remedy our present condition as evidenced by my recent budget proposal to retain tax cuts passed last year while maintaining current levels of expenditures.

[1] Text of the bill appears in appendix, p. 155.

I believe that this act that we are considering now is in keeping with the spirit in which I made that pledge. I assert that Mr. Helms' bill is a logical and necessary step in the direction of restoring budgetary responsibility to the Congress.

As Senator Dole will tell you in his opening statement, the purpose and effect of the act is twofold. First, it would set an authorizing process for appropriating funds to the Federal courts. Article I, section 8, clause 9 of the Constitution gives Congress the power to constitute tribunals inferior to the Supreme Court. I contend that the power of authorization oversight is but one facet of the power to create. The Congress has the constitutional right and duty to review this budgetary procedure in a responsible manner.

Second, this act would put an end to automatic, back-door pay raises for Federal judges. Let me say parenthetically at this point that my congressional voting record would show that I do not approve back-door increases for Members of Congress either. We are all aware of the circumstances by which judicial salaries were increased in 1981. Congress is saddled with an appropriations mechanism under which the President's budget recommendations for the judiciary become law if we do not react negatively. The result of the present law is that Congress must blindly consider those salary increases based upon the recommendation of a recommendation. This unfortunate state of affairs is quite adequately portrayed by last session's 27-minute fiasco which was the weekend that the fiscal year came to an end. In light of all this, I contend that we have lost control.

I am aware of the arguments against this act. As for the questions concerning the threat to the constitutional separation of powers, I point out that under this act the judicial branch will not be treated any differently than the executive branch. While the executive office itself is free from authorization oversight, such oversight is provided for the executive branch agencies. Similarly, under this act, the Supreme Court would be exempted from oversight, and only the congressionally created Federal courts would be affected. I might add that presently 39 States require statutory acts to raise judicial salaries. In addition, the State of Tennessee's judiciary committee exerts control over the State judicial budget while generally State budgets are submitted only to the State budget or appropriations committees, not through a committee which has subject-matter jurisdiction. This indicates to me that many States have chosen the wiser course of action, a course which Congress should follow.

Finally, I would like to refer to the prepared statement of one of our witnesses which was offered before the House Judiciary oversight hearings back in May. Judge Hunter, who represents the Judicial Conference, was quoting Republican Senator and former chairman of the Judiciary Committee, Albert B. Cummings of my State of Iowa who in 1922 was the principal sponsor of the controversial reform legislation which created the Conference of Senior Circuit Judges. It was from this entity that the present day Judicial Conference was developed.

In 1922, Senator Cummings faced objections similar to those which have been offered against S. 1847. Many opponents of that proposal

argued that any regulation of the judiciary would be an encroachment on the independence of the Federal bench. Further, they asserted that any broadening of such power might be used in some way by influential figures to manipulate the results in particular cases. With the following words, Senator Cummings defended his radical proposal as a means by which the crisis of unwarranted delays and unnecessary costs could be resolved efficiently, and I quote from Senator Cummings:

> When we contemplate a situation in which thousands and thousands of persons accused of crime must lie in jail for a year or two years, if they are unable to discharge themselves by giving bond, awaiting trial, and when we reflect upon the fact that in many parts of the United States it is utterly impossible to secure the trial of a civil suit within a year or two years, where both attorneys and parties are ready to proceed with the trial, it is to me a source of great humiliation.

Of course, I suppose we could say the same thing about Members of Congress interested in this legislation and about the conditions in the judiciary today. It is with this same sense of urgency that I suggest that this act be passed so that the Congress may have the opportunity to address these pressing demands and provide an ever higher quality of justice, as timely and as inexpensively as reasonably possible.

Now I would like to introduce the members of the first panel. Since Senator Helms is not here, he has asked that his written statement be included in the record. Without objection, it will be made part of the record at this point.

[The prepared statement of Senator Jesse Helms follows:]

PREPARED STATEMENT OF SENATOR JESSE HELMS

Senator Dole, Senator Grassley: I appreciate very much the opportunity to present my testimony in support of S. 1847, to require an annual authorization for the Federal court system excluding the Supreme Court, which I introduced in the Senate on November 12, 1981.

Ordinarily, I would not have submitted legislation on a subject which directly affects the oversight responsibility of a Committee of which I am not a member. However, in this instance, I felt that the need for legislation was so clear that I ought to take action to bring the issue before the Committee so that a full review can be conducted.

A primary purpose of introducing S. 1847 was to correct the continuing problem of back-door pay raises received by Federal judges contrary to the intent of Congress. On two recent occasions, Federal judges have received increases in pay notwithstanding the contrary intent of Congress because of a strict construction by the courts of the prohibition in Article III of the Constitution which forbids a decrease in the pay of sitting Federal judges.

On both occasions, Congress sought to cap the pay of Federal judges, notwithstanding the provisions of the Federal Salary Act of 1967 ( 2 U.S.C. Sec. 356) or of 5 U.S.C. Sec. 5305, the statute which triggered increases at the end of the two fiscal years involved. In short, judges were receiving increases in pay not pursuant to any rational decision of Congress but as a result of the position of the minute hand on the Senate clock on the last day of each fiscal year. That, in my view, is the wrong approach toward setting compensation for judges and is at odds with the basic notions of representative government embodied in the Constitution.

Section 4 of the bill, as introduced, was intended to cure that defect.

However, soon after the introduction of the bill, the distinguished Chairman of the Subcommittee on the Courts, Senator Dole, fully cured the defect which

Section 4 was intended to reach. He offered an amendment to H.J. Res. 370, and that amendment subsequently became public law as Section 140 of P.L. 97-92. The Dole Amendment provides, in essence, that notwithstanding any other provision of law, no funds appropriated by any Act of Congress can be used to increase the salary of any Federal judge except pursuant to an authorization enacted after the day of enactment of P.L. 97-92. The Dole provision, as permanent law, obviates the need for Section 4 in the legislation as proposed. Accordingly, I suggest to the subcommittees that Section 4 be deleted in its entirety as unnecessary.

In preparing these remarks, I had an opportunity to review the testimony concerning Section 4 prepared by representatives of the Judicial Conference of the United States. Although the issue is moot, they have misquoted the provisions of Section 4 as it appears on page 19 of their testimony. Section 4 of the bill provides that no salary increase shall inure to the benefit of any Federal judge "except as may hereafter be specifically provided." The representatives of the Judicial Conference omitted the word "hereafter", thereby completely confusing the meaning of Section 4. Obviously, without the word "hereafter", the existing statutory authority for automatic or periodic increases would remain intact. The Judicial Conference, therefore, took out the key word in Section 4, changing the meaning of the section entirely and then speculating about what the section means after the key word is dropped. Although I am reasonably certain that the error was not intentional, I thought I should bring it to the attention of the two subcommittees, particularly since the word "hereafter" is used in the same context in the permanent prohibition contained in Section 140 of P.L. 97-92.

After deleting Section 4, the balance of the bill remains, in my judgment, very important to the proper review of the annual budget of the Federal judiciary and for that reason alone ought to be enacted.

At present, the Federal judiciary receives funds for its programs and operations directly through the appropriation process without any programmatic review in the authorizing or legislative committees of the two Houses. Unlike the Department of Justice, and most other Departments of the Executive Branch, the Federal judiciary is not subject to and does not receive the normal annual oversight which has proven so beneficial in other areas of government. What possible objection can there be to greater illumination of the programs and activities of our courts? I feel that the courts, as much as any other part of government, should be required to operate in the sunshine with all the facts regarding their programs and activities fully before the public and the peoples' representatives. The appropriations process alone is insufficient to achieve that goal.

Only in the authorizing committees can the people be guaranteed the careful programmatic scrutiny of the Federal judiciary to which the people are entitled. The Appropriations Committee, burdened with review of a Federal budget in excess of $800 billion cannot possibly provide sufficient study to an appropriation to the Federal judiciary of only about $800 million, which amounts to only one-tenth of one percent of the total appropriated each year.

Yet, we are dealing with an entire separate branch of the government with immense power. We are dealing with one-third of the complete Federal establishment in terms of powers allocated by the Constitution.

The Framers intended for Congress to have plenary authority over the disbursement of funds from the United States Treasury. The Framers, inspired though they were, could not have conceived of a budget of the magnitude that Congress must now review. Fortunately, the Constitution, in addition to giving Congress the power to appropriate, also gave each House the power to adopt its own rules of procedure and to authorize the inferior establishment of the other two branches of government insofar as not specifically described and ordained in the Constitution. As a result of those powers, Congress over the recent years, faced with an everexpanding growth in appropriations, has gradually expanded with that growth the process of annual budget authorization, thereby delegating to the authorizing or legislative committees the responsibility for the programmatic review which has become impossible in the Committees on Appropriations.

Although a simple Senate resolution which changed the rules of the Senate would be sufficient to resolve the problem by making any appropriation for the Federal judiciary subject to a point of order unless previously authorized in the current or then preceding fiscal year, I believe that a better course of action would be to meet the problem head on by the proposed statute now before these subcommittees. In that manner, the House also would be given an opportunity to give its assent to the procedure I feel the Senate ought to adopt. However, if he House were reluctant to give its approval, then the Senate should consider the advisability of amending its own rules to achieve the same result. That power is granted by the Constitution and should be used if necessary.

Notwithstanding the foregoing, in drafting the bill before the subcommittees, I excluded any requirement for programmatic budget review of the activities of the Supreme Court. My reason for that exclusion was two-fold: First, the Supreme Court is specifically ordained in the Constitution and must exist in some form so long as the Constitution itself is not changed. Such is not the case for the entire balance of the Federal judiciary whose existence is wholly dependent on Congress. Second, the exclusion of the Supreme Court should obviate any criticism based on the unfounded allegation that programmatic budget review is designed to influence the decisions of the courts. In other words, the Supreme Court, not being subject to the authorization process, would be in position to guarantee that no undue influence was exerted as a result of that process in seeking to shape a rule or a decision in a particular case of national significance.

Finally, I assure the members of the subcommittees and of the Committee on the Judiciary that I am cognizant of the heavy workload of the Committee and its subcommittees. I am aware that the Committee on the Judiciary receives more than one out of every four bills introduced in the Senate and is responsible for the annual authorization of the Department of Justice and the periodic authorization of the Patent and Trademark Office of the Department of Commerce. If a one-year annual authorization process for the Federal judiciary would inordinately increase the workload of the Committee on the Judiciary, then I recommend that the Committee consider a modification of my proposal so that the Federal courts are authorized on a biennial basis, perhaps alternating with a biennial authorization for the Department of Justice. Although an annual review is, in both cases, preferable, a review in each Congress should be sufficient to achieve the basic objective of the legislation and to retain sufficient oversight of the Department of Justice.

Again, I thank you for allowing me to present my views to this panel, and I also thank you for the prompt attention you have given to my proposal.

Senator GRASSLEY. Now we are going to hear from Hon. Judge Hunter and Hon. Robert Bork, and I understand that this is Judge Bork's first official act in way of his new appointment and he is to be congratulated upon his new position.

These gentlemen will be testifying for the Judicial Conference. Judge Hunter is a senior judge of the U.S. District Court for the Western District of Missouri and chairman of the Court Administration Committee of the Judicial Conference. Judge Bork serves on the U.S. Court of Appeals for the District of Columbia. As I said, we have recently confirmed his nomination. Judge Bork has also served as U.S. Solicitor General.

I would like to have you two gentlemen come to the table at this time. You may proceed in either order that you would like. Would you also introduce the people accompanying you?

**STATEMENT OF HON. ELMO HUNTER, U.S. DISTRICT COURT JUDGE, WESTERN DISTRICT OF MISSOURI (ON BEHALF OF THE JUDICIAL CONFERENCE), ACCOMPANIED BY HON. ROBERT BORK, U.S. DISTRICT COURT OF APPEALS, DISTRICT OF COLUMBIA; WILLIAM WELLER, LEGISLATIVE AFFAIRS OFFICER, ADMINISTRATIVE OFFICE; AND DEWEY HEISING, CHIEF, FINANCIAL MANAGEMENT DIVISION, ADMINISTRATIVE OFFICE**

Judge HUNTER. Mr. Chairman, I have seated with me to my right Mr. William Weller, who is the Legislative Affairs Officer of the Administrative Office, and Mr. Dewey Heising who is the Chief of the Financial Management Division of the Administrative Office. I am sure you know Judge Bork, because you have just referred to him.

Mr. Chairman, I expect that I first should ask permission to file my written remarks as of the close of my oral presentation. I say to you that it is a pleasure for me to appear here today as a representative of the Judicial Conference of the United States, pursuant to your invitation, to comment on S. 1847, the Salary Control Act of 1981. I welcome and I thank you for this opportunity to bring to you the views of the Committee on Court Administration of the Judicial Conference of the United States which I chair.

Because of the broad scope of its subject matter, the Court Administration Committee traditionally reviews, at the request of Congress, more proposed legislation than all the rest of the conference committees combined.

At the request of the parent committee, its Subcommittee on Judicial Improvements studied and evaluated S. 1847, and, in turn, the parent committee likewise studied and evaluated the proposed bill.

Both the subcommittee and the parent committee unanimously concluded that S. 1847 should not be enacted. We are convinced that our reasons for concluding that S. 1847 should not be enacted are sound, persuasive, and in the best interests of the Congress and the public.

We anticipate that the Judicial Conference of the United States, 2 weeks from today at its regular semiyearly meeting here in Washington, D.C., will also conclude that S. 1847 is not a good bill and should not be enacted.

We first asked what are the purposes and what is the need for S. 1847. Senator Helms views the two purposes of the bill as, first, and I quote: "To set up an authorizing process for the appropriating of funds to Federal courts," and, second, "to put an end to automatic pay raises to Federal judges."

He premises the need for the bill on the following presumption, and, again, I quote:

> Under the present law, the executive branch, and not the Congress, sets the salaries and budgets of these judges and their staffs. Congress has little chance to form its own coherent budget policy for the judiciary.

With all deference to the Senator, the presumption is in fact not a valid one. Congress does set the salaries.

Excuse me. Senator Dole, I am Judge Hunter from Kansas City. I am a neighbor of yours, and I am very pleased to be able to make this appearance before you.

Senator DOLE. Thank you. I apologize for being a bit late, but I assume Senator Grassley indicated that the Senate was in session until 2 a.m.

Judge HUNTER. Yes, sir, if I had your hours, I don't know if I would be here.

Senator GRASSLEY. I suggested that we might stop and have your opening statement when you came in.

Senator DOLE. No; that is fine. Go ahead. I will give my opening statement later.

Judge HUNTER. Thank you, sir. With all deference to Senator Helms, his presumption is in fact not a valid one. Congress does in fact set the salaries and budgets of the Federal judiciary and their staffs. Congress annually reviews in great detail the proposed budget of the Federal judiciary, makes changes and modifications, and finally approves a complete budget for the entire judicial branch of Government.

Sir, I offer for filing at this point a very large and highly detailed document entitled, "The Judiciary: Budget Estimates for the Fiscal Year 1983, Congressional Submission." I will simply hold it up and I will physically hand it to the appropriate person.

This document, more than anything that I can say, shows the exquisite detail given to the Federal court budget by the two Appropriations Committees of the Congress, the Senate and the House.

Its counterpart has been similarly annually provided to the Congress through the Congress two Appropriations Committees. This one was the subject of approximately 2 days of hearings before the House Appropriations Committee yesterday which, as I understand, will be ongoing today. Similar Senate appropriations hearings are soon to follow.

I assure you that there is no need to duplicate the function of those two experienced and knowledgeable committees of the Congress. To do so would waste the highly limited time of the Congress and would serve no useful purpose. I doubt that the Congress really wants to do that.

In addition to the very careful oversight of the judiciary's functions and programs through the actions of the two congressional Appropriations Committees, it is routine for various committees of the Congress to have oversight-type hearings on matters that appear to need them.

This selection and flexible oversight is and always has been welcomed by the judiciary. I call your attention to the May 6, 1981, oversight hearing before the Subcommittee on Courts, Civil Liberties, and Administration of Justice of the Committee on the Judiciary, House of Representatives, as an excellent example of that type of flexible, selective oversight by the Congress.

To add a mandatory, inflexible, annual, complete oversight of all matters, whether needed or not, whether duplicative or not, not only unnecessarily burdens the Congress and the judiciary but connotes a sunset-type law approach to establish all necessary functions of the judiciary.

The courts are primarily service-oriented. They exist civilly to resolve disputes between citizens and between citizens and their Govern-

ment, and to protect Federal statutory and constitutional rights and our people who have those rights.

On the criminal side, they provide the necessary forum for trying those accused of violating the criminal laws enacted by the Congress.

These are not functions that should be burdened with a mandatory, inflexible, annual, sunset-type statute.

Much of the judiciary's budget is properly termed "uncontrollable." For example, the representation of defendants and other persons pursuant to the Criminal Justice Act is uncontrollable because the rates of compensation for court-appointed counsel are established by law subject to limitations based on the nature of the offense. The budgetary requirements are dependent on the number of persons prosecuted and who financially qualify for such representation. Expenses relating to petit and grand juries are also largely uncontrollable. With recognized exceptions, litigants in both civil and criminal cases have a constitutional right to trials by juries whose fees and allowances are fixed by the Congress.

Grand juries are convened at the request of the U.S. attorney and, hence, the cost is in large measure governed by the policies of the Department of Justice. This is also true with regard to criminal-case proceedings, because filings increase or decrease at the discretion of the Department of Justice.

The Congress regularly by statute establishes new rights and remedies and gives standing to engage in civil litigation to enforce those rights.

The number of probationers and parolees under the supervision of the probation officers is likewise uncontrollable as that term is used here.

Bankruptcy filings, now rapidly and greatly increasing, are primarily a reflection of the Bankruptcy Reform Act and the current state of our economy.

I think I have illustrated my point. To apply an annual, mandatory, inflexible sunset approach to these historical and congressionally-established functions would unnecessarily create serious mischief at the least and raise grave constitutional problems at the worst.

What would happen if, for some unforeseen reason, the hearings contemplated and mandated in S. 1847 were not timely held and completed? Would the courts go out of business, even temporarily? Would defendants guilty of crime go free because of delay contrary to the requirements of the Speedy Trial Act? Would the innocent public be deprived of all rights to timely litigate their rights? Would such backlogs occur as to insure the old saying that "justice delayed is truly justice denied"?

Mr. Chairman, the present systems assures careful, knowledgeable, and timely consideration by the Congress through its Appropriation Committee of every phase of the judiciary budget, including oversight as needed.

Additionally, Congress has not hesitated to undertake program oversight in the past, and the judiciary welcomes such oversight when subjects present themselves. The system, as it is now being employed, is working, and we hope that no change is made. None is needed.

I call to your attention, Senator, the fact that the judiciary budget is and has been, at least since 1940—and that is as far back as I can go on it—less than one-tenth of 1 percent of the Federal budget. It has never reached the one-tenth of 1 percent mark; it has always remained a lesser sum. The judiciary, and I believe the congressional Appropriations Committees, take this as some evidence of the careful and outstanding work done by your two Appropriations Committees in going over in great detail every bit of money that the judiciary receives. I doubt if any other budget of any agency is gone over in that detail, and with that care, and with such a good result.

Now, turning to the salary-increases-for-Federal-judges question, clearly, the second purpose to be served by S. 1847—that of reforming congressional procedures governing the approval of salary increases for Federal judges—is a purpose up to a point which is fully within the policy parameters of the legislative branch.

I can assure you that every Federal judge who has served the courts in the past two decades is painfully aware of the fact that the Constitution protects only against reductions in Federal salaries, but does not guarantee increases in them.

These increases in judicial salaries which have caused comment since 1976, those which Senator Helms has characterized as "backdoor increases," are not, however, directly the product of the Constitution or of the judges. They are the product of Congress enactment in 1975 of legislation which has since drawn into annual political discussion of comparability adjustments, Article III of the Constitution, and the Supreme Court, as well as the inferior courts.

I suggest that the cause of the dilemma is clear and so, too, is its solution: expressly amend the 1975 legislation.

In his introductory remarks, Senator Helms has stated that, and I quote:

> Section 4 . . . of the bill . . . would put a stop to these backdoor increases for Justices of the Supreme Court and for judges of the inferior courts created by Congress.

Section 4 of the bill provides:

> Notwithstanding any other provision of the law, judges, both of the Supreme Court and inferior courts of the United States, shall receive, for their services, no increases in compensation during their continuance in office, or during their retirement therefrom, except as may be specifically provided by separate act of Congress authorizing such increase and stating the amount thereof.

That language is indeed clear, Mr. Chairman; yet its consequences are far from clear. It may well achieve the objective of precluding the comparability adjustments—also referred to as "October 1 cost-of-living increases"—authorized under 5 U.S.C. section 5305—those salary increases which Senator Helms has characterized as "backdoor" increases.

Will it also, however, preclude judicial salary increases authorized by the Federal Salary Act of 1967 (2 U.S.C. section 356)—increases recommended by the Commission on Executive, Legislative, and Judicial Salaries (commonly referred to as the "Quadrennial Commission")?

Senator Helms' introductory remarks appear to be clearly directed to increases under 5 U.S.C. section 5305, yet section 4 of the bill could

be interpreted to reach increases in basic salary levels under 2 U.S.C. section 356.

Who may ultimately have to resolve the question if it is framed at law? Obviously, the courts. Just as they were drawn of necessity into resolution of the issues raised in the *Will* case, our Supreme Court Justices might be drawn into resolving questions raised by section 4 of S. 1847.

Members of the Court Administration and the Judicial Branch Committees of the Judicial Conference, therefore, have unanimously recommended that, if Congress should conclude that revisions are needed in either 5 U.S.C. section 5305 or 2 U.S.C. section 356, it expressly amend those statutory provisions and avoid the ambiguous and uncertain consequences of enactment of the language now contained in section 4 of S. 1847.

In conclusion, Mr. Chairman, I believe I can summarize the reasons why all members of the Judicial Conference's two committees which have evaluated S. 1847 have unanimously recommended that the bill not be approved with these comments.

First, if the first purpose to be served is that of requiring an annual appropriations authorization, that purpose is already more than adequately being served by the routine practices and procedures followed by both the Senate and House Appropriations Committees in processing title IV of the Commerce, State, Justice, and Judiciary appropriations bill each year.

Second, if the first purpose to be served is that of requiring an annual program authorization, that purpose is unnecessary and unwise. Regular oversight procedures followed by the House and Senate Judiciary Committees are, first, now both adequate and more flexible and protective of resources—both Congress and the Judiciary's—than would be an annual pro forma ritual; and, second, less potentially disruptive of the provision of fundamental judicial services to citizens than would be a statutorily required annual procedure that might fail of completion for a broad spectrum of unforeseen reasons.

Third and finally, if the second purpose to be served is that of revising existing statutorily mandated procedures for conferring annual comparability adjustments in judicial salaries, the precise statute mandating those procedures should be amended. The language in section 4 of S. 1847, while superficially clear, may all too easily lead to litigation which will necessarily again require the Supreme Court to act as it did in the *Will* case, which prompted the introduction of section 4 of S. 1847.

Last, although I do not include it as a large reason, the bill as drafted is poorly drafted. There are a number of omissions in it and a number of matters in it which are unclear. Judge Bork mentioned some of those in his statement, and if any followup on that is needed, I am sure the Administrative Office will be glad to provide by letter or some document precisely what those are.

I am certain, Senator, that the Judicial Conference of the United States, in view of the reasons that we have presented here, when it meets in 2 weeks here in Washington, D.C., will adopt the recommendations against this bill which both the subcommittee and the

parent committee have made and have presented to you here today in the very brief 5 minutes time that I have been allocated.

Senator DOLE. You have taken 22 minutes. Let me suggest that at 10:30, we are going to be involved in probably another series of votes so I am going to have to insist that the witnesses summarize their statements. Your entire statements will be made a part of the record. We would like to ask some questions, but we are going to be denied that opportunity if you read your statements. We can all read. If you just summarize your statements, it will speed up the process.

Judge Bork?

Judge BORK. Mr. Chairman, I should say that I am not from the Judicial Conference; and, therefore, what I have to say does not necessarily represent its views. However, I would like to make some observations about this bill.

In the first place, the present mechanism may well be unconstitutional. We will learn more about that from the Supreme Court in a case now up there. Therefore, there may be a necessity for a change in the means by which appropriations and salary increases are done, particularly salary increases.

Second, however, I would like to say that this bill is poorly drafted. I have listed some of the reasons—the difficulties with the drafting—in my statement. Many of those can be cured by redrafting. I am not sure, however, that all problems can be cured that way.

If you do adopt a different system, whether it should be one with a two-step process—authorization and appropriations—is another question. That may lead to questions of a very serious sort, or it may lead to less oversight because of the need to keep the courts functioning. You may have to rush the process and actually get less oversight than you now have if you tie oversight to this bill.

In general, the idea of a more regular appropriations process rather than a congressional veto of a Presidential submission seems to be desirable.

I suppose insofar that I am bothered, in addition to what I have already said—it is not by Senator Helms' remarks or those of anybody on this committee that I know of—but some of the other people appearing on behalf of this bill have suggested purposes for it which I think are troublesome.

One is a desire to discipline the courts for unpopular decisions. I am not one of those who thinks it is inappropriate for the political branches to respond to the courts when they think the courts have strayed out of their proper area. But I don't think holding down judicial salaries is a way to discipline the courts. It will not be effective. The courts simply will not overrule decisions that are unpopular in order to get a pay raise. If that is a purpose, I think it ought not to be. As I have said, the oversight is already there.

Briefly, what I hoped to talk about today, I will mention at the end of these remarks which I will keep very brief. That is, that I think additional oversight is required. I think the Federal courts are in a great deal of trouble right now. Personnel have to be expanded constantly. Productivity does not keep up with the expansion; in fact,

it declines. A powerful judiciary is necessarily a small judiciary, as Felix Frankfurter said.

I think the time has come for Congress to consider drastic reductions in Federal court jurisdiction, including diversity jurisdiction, including a number of crimes in which there is no real Federal interest. Instead, we seem to be adding more and more crimes to the list of Federal crimes.

Finally, I would suggest to you that, ultimately, you will have to go far beyond that if you want to preserve the Federal courts in anything like their present condition—or improve them—and create a system of article I tribunals that can handle simple, repetitive, factual disputes arising out of the many regulatory programs we have.

These proposals were made in a report published in 1977, which was a report of a committee in the Department of Justice which I headed. I would like to submit that report with these comments because I think that is an area of desperately needed oversight.

I conclude my remarks at this point.

Senator DOLE. I think before we have the other witnesses there may be questions of the judges. I know they have busy schedules, too. Senator Grassley, do you have questions?

I might say, first of all, I will just include my statement in the record.

[The statement of Senator Robert Dole follows:]

OPENING STATEMENT OF CHAIRMAN DOLE

THE SUBCOMMITTEES ON COURTS AND AGENCY ADMINISTRATION OF THE SENATE JUDICIARY COMMITTEE ARE HOLDING HEARINGS TODAY ON S. 1847, THE FEDERAL JUDICIAL SALARY CONTROL ACT, INTRODUCED BY SENATOR HELMS. THIS BILL HAS TWO KEY PROVISIONS. THE FIRST WOULD SUBJECT THE JUDICIARY, EXCEPTING THE SUPREME COURT, TO AN ANNUAL AUTHORIZATION. THE SECOND WOULD PROHIBIT JUDGES, INCLUDING MEMBERS OF THE SUPREME COURT, FROM RECEIVING INCREASES IN COMPENSATION UNLESS SPECIFICALLY AUTHORIZED BY CONGRESS. THIS BILL WAS JOINTLY REFERRED TO THE SUBCOMMITTEES UNDER A SIXTY DAY TIME LIMIT, WHICH WAS SUBSEQUENTLY EXTENDED TO MARCH 1. BECAUSE THE BILL RAISES SIGNIFICANT ISSUES CONCERNING THE RELATIONSHIP BETWEEN TWO BRANCHES OF GOVERNMENT, AND THE EXTENT TO WHICH ONE BRANCH MAY PROPERLY OVERSEE THE FUNCTIONS OF THE OTHER, WE FELT THAT HEARINGS SHOULD BE HELD ON THE PROPOSAL BEFORE THE SUBCOMMITTEES WERE DISCHARGED FROM FURTHER RESPONSIBILITY.

THE PORTION OF THE BILL PERTAINING TO JUDICIAL SALARY INCREASES IS SOMEWHAT LESS CONTROVERSIAL THAN THE BILL'S REQUIREMENT OF AN ANNUAL AUTHORIZATION, AND ITS PURPOSE IS FAIRLY STRAIGHT-FORWARD. PURSUANT TO A 1975 LAW, MEMBERS OF CONGRESS, JUDGES, AND TOP LEVEL FEDERAL WORKERS RECEIVE AN AUTOMATIC COST-OF-LIVING INCREASE EFFECTIVE AT THE START OF EACH FISCAL YEAR. IN UNITED STATES V. WILL, THE SUPREME COURT HELD THAT UNDER ARTICLE III OF THE CONSTITUTION, THE CONGRESS COULD NOT RESCIND THESE PAY RAISES FOR JUDGES SUBSEQUENT TO THEIR EFFECTIVE DATE. THIS DECISION RESULTED IN FEDERAL JUDGES RECEIVING FOUR PAY RAISES, SINCE 1976, WHICH WERE NOT GIVEN TO OTHER TOP FEDERAL EMPLOYEES. S.1847 WOULD PREVENT THIS SITUATION FROM RECURRING BY REQUIRING THAT ALL PAY INCREASES BE SPECIFICALLY AUTHORIZED BY CONGRESS BEFORE THEY WOULD BECOME EFFECTIVE.

91-266 O - 82 - 2

THE PORTION OF S.1847 WHICH WOULD REQUIRE AN ANNUAL AUTHORIZATION FOR THE JUDICIARY IS SOMEWHAT MORE CONTROVERSIAL, AND ITS PURPOSE HAS BEEN THE SUBJECT OF EXTENSIVE AND VIGOROUS DEBATE. UNDER THE CURRENT PROCEDURES, THE JUDICIARY SUBMITS ITS BUDGETARY REQUESTS TO THE EXECUTIVE BRANCH, WHICH, IN TURN, SUBMITS THESE REQUESTS TO THE CONGRESS AS PART OF THE OVERALL BUDGET. PROPONENTS OF S.1847 ASSERT THAT THIS PROCESS HAS PREVENTED THE CONGRESS FROM EXERCISING MEANINGFUL OVERSIGHT ON JUDICIARY MATTERS AND FROM DEVELOPING COHESIVE POLICIES AND GUIDELINES FOR THE JUDICIAL BUDGET. RATHER, EACH YEAR THE CONGRESS IS FORCED TO QUICKLY REVIEW AND AMEND APPROPRIATIONS FIGURES PROVIDED BY ANOTHER GOVERNMENTAL BRANCH. PROPONENTS HAVE ALSO POINTED OUT THAT MOST AGENCIES AND DEPARTMENTS IN THE EXECUTIVE BRANCH ARE SUBJECT TO SOME KIND OF AUTHORIZATION REQUIREMENT, AND QUESTION WHY THE INFERIOR COURTS AND OTHER SEGMENTS OF THE JUDICIARY SHOULD BE INSULATED FROM THIS CONGRESSIONAL OVERSIGHT FUNCTION.

OPPONENTS, ON THE OTHER HAND, HAVE ASSERTED THAT THE INEVITABLE, IF NOT INTENDED, RESULT OF THE AUTHORIZATION REQUIREMENT WOULD BE CONGRESSIONAL INTERFERENCE IN JUDICIAL POLICY AND DECISION MAKING. THEY FEEL THAT THE AUTHORIZATION PROCESS WOULD SIMPLY BECOME ANOTHER VEHICLE FOR LEGISLATION DESIGNED TO LIMIT "JUDICIAL ACTIVISM" IN SUCH CONTROVERSIAL AREAS AS BUSING, ABORTION, AND SCHOOL PRAYER. THUS, BASED ON THESE PERCEPTIONS, THE BILL HAS BEEN CRITICIZED AS VIOLATING THE SPIRIT, IF NOT THE LETTER, OF CONSTITUTIONAL REQUIREMENTS DESIGNED TO ENSURE THE AUTONOMY OF THE JUDICIARY AND ITS INSULATION FROM POLITICAL PRESSURES.

WE WILL BE HEARING FROM THE HONORABLE ELMO HUNTER AND THE HONORABLE ROBERT BORK, WHO WILL BE TESTIFYING IN BEHALF OF THE JUDICIAL CONFERENCE. JUDGE HUNTER IS A SENIOR JUDGE

OF THE U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI AND CHAIRMAN OF THE COURT ADMINISTRATION COMMITTEE OF THE JUDICIAL CONFERENCE. JUDGE BORK SERVES ON THE U.S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, THE SENATE HAVING RECENTLY CONFIRMED HIS NOMINATION TO THAT POSITION. JUDGE BORK HAS ALSO SERVED AS U.S. SOLICITOR GENERAL. IN ADDITION, WE WILL BE HEARING FROM THE NEW YORK CITY BAR, AND A PANEL OF THREE WITNESSES WHO WILL BE SETTING FORTH THE PROS OF THE BILL FROM A PUBLIC INTEREST AND LEGAL STANDPOINT.

I LOOK FORWARD TO HEARING THE TESTIMONY OF OUR WITNESSES AND TO ALL I SAY "WELCOME" AND "THANK YOU FOR COMING." I WOULD LIKE TO NOTE THAT SENATOR HELMS, THE SPONSOR OF THE BILL, AND THE JUSTICE DEPARTMENT WILL SHORTLY BE SUBMITTING WRITTEN STATEMENTS ON S.1847 AND REQUEST THAT THE HEARING RECORD BE LEFT OPEN UNTIL THEY ARE RECEIVED. I WOULD ALSO LIKE TO ADVISE ALL OF OUR WITNESSES THAT THEIR PREPARED WRITTEN STATEMENTS WILL AUTOMATICALLY BECOME A PART OF THE HEARING RECORD. I WILL NOW TURN TO SENATOR GRASSLEY FOR THE PRESENTATION OF HIS OPENING STATEMENT.

Senator DOLE. Also, I have a series of questions. I hate to burden the witnesses, but Senator Thurmond has some questions he would like to have responses to. They are rather lengthy so I will not go into them at this time, but I will submit them to whichever witness.[1]

Senator GRASSLEY. Judge Clark indicated in his testimony before the House Appropriations Committee on Tuesday that the Judicial Conference is sensitive to this Nation's economic troubles. I appreciate the fact that the Judicial Conference is aware of these economic problems; however, I doubt that the Judicial Conference receives the letters that I do regarding the Federal deficit. In this particular instance, we had figures submitted by the conference of $777.6 million or an increase of $100 million over last year's appropriations.

Now, I am not arguing that this increase may not be necessary; however, it seems to me that the more responsible approach would be an increase in oversight process where the Judiciary Committee is forced to examine the needs of the Federal court system.

From that standpoint, as opposed to just the dollars and cents, I would like to have your comments, Judge Hunter and Judge Bork.

Judge HUNTER. Senator, the present ongoing process reviews in total detail every dollar that the Federal courts are requesting in their budget. In that process of reviewing all those matters, I think that the Appropriations Committees of the House and Senate do already what you are suggesting. They do examine not just the dollar figure, but to a great extent the functions for which those dollars are going to be used.

I just do not see where putting another—well, let's put it this way: we have two hearings now before the House and the Senate Appropriations Committees. This would simply make four. You would have four hearings on basically the same subject.

The increase that you mentioned in the budget is primarily due to inflation. We know, all of us, what inflation has done to us. Largely, the dollars that we are requesting are simply the old dollars parlayed into present purchase power.

As I say, I cannot see any need for duplicating what already is done. I think that would be the effect of the bill.

Senator GRASSLEY. I guess I would take exception to the point that it would be a duplication. I am aware that the review function is now carried out by the Appropriations Committee. What this act would allow is an opportunity for Congress to formulate, as opposed to just review, a strong program for the judiciary.

I believe that there is a compelling congressional interest in providing that justice is not delayed and not denied. I guess I would ask you if you would not agree that there is a distinction between review and formulation?

Judge HUNTER. I think that there is such a distinction. I might point out that Congress gets its oversight on these matters. Let us take, for example, the increase in judgeships. There isn't a single judgeship ever authorized, except by this Congress. The Judiciary Committee which handles that usually has the chief judges of the particular districts involved or the chief judges of the circuits involved come to testify, justify, and explain. Those judges are glad to do that because they understand the need.

[1] Senator Thurmond's questions for Judges Hunter and Bork and their responses can be found in the appendix, p. 179 and p. 181.

The basic point is that oversight is already in place. It is not just limited to the appropriations bill. It is taken up by other appropriate committees and subcommittees of the Congress already.

We would simply be putting a duplication of that into effect if this bill were enacted.

Senator GRASSLEY. But it does deny the Congress one overall policy-making committee reviewing.

Judge HUNTER. Senator, may I refer that to Mr. Weller?

Mr. WELLER. Senator, the vast majority of formulation of the judiciary's budget does take place in the Judiciary Committee, through all the statutory requirements on the courts that are imposed by the Judiciary Committee's substantive legislative action.

However, the Environmental and Public Works Committees also play a very big role in our budget. They approve court facilities. That, today, is a very big piece of that budget. We pay rent to GSA, which constitutes a considerable percentage of our total budget amount.

There are other examples of committees on the hill that have a direct bearing on the judiciary. Not all substantive legislation, by any means, goes through Judiciary. Not all of it, by any means, is oversighted to be sure that an impact on the judiciary is assessed by this primary committee.

A great deal of our budget comes from there. The new process that is being advocated by this legislation will not do a thing to correct that.

Senator GRASSLEY. Judge Bork?

Judge BORK. I tend to agree with you, Senator, that Congress ought to initiate and not react, but I do not know that adding extra committees is necessary to that process. I don't think that adding extra committees to the budgetary process is necessary to make Congress the initiator rather than the reactor. Beyond that, I agree with what has been said. There is a great deal of oversight. Perhaps, there should be more. I do not know that it needs to be tied to the budget process.

Senator DOLE. Senator Baucus?

## STATEMENT OF SENATOR MAX BAUCUS

Senator BAUCUS. Thank you, Mr. Chairman. Gentlemen, first I would like to make a brief comment. I think that the idea of an authorization has some merit. As the chairman stated, we may have to leave here at 10:30 because of another bill on annual authorization.

That is the Department of Justice bill which is very closely related to what this bill might become. This DOJ authorization bill attracts flies like honey. These flies are all the controversial riders that come along. The Senate has been working on the DOJ authorization bill for fiscal year 1982 for a long time. I am very concerned that if we have an annual court authorization bill, that we are going to have even more riders and the Senate's business is going to be delayed even further.

The question I want to ask is whether there is any way you can think of to make sure that this proposed authorization bill could be made to be strictly a judicial housekeeping bill, rather than one that becomes burdened with all these riders?

For example, it occurs to me that perhaps the bill could be amended to state that no amendment that is not germane to the court-house-keeping purpose of the bill would be in order. Can any of you think of any way in which we could prohibit or significantly discourage all these riders? Would that be a good idea?

Judge HUNTER. I think we have to say candidly that there simply is no guarantee. That is one of the real worries. Perhaps, Mr. Weller might add some thinking to that.

Mr. WELLER. I must agree with Judge Hunter. If you go into this process, there is no way you can contain it.

Senator BAUCUS. I take it that this aspect of the proposal is bothersome to you.

Mr. WELLER. Yes, sir. It is very bothersome.

Senator BAUCUS. Frankly, it is difficult to develop a way to keep the scope of the bill narrow. It did occur to me that perhaps nongermane amendments could be discouraged. Still, we have a disconcerting habit around here of not paying any attention to what the parliamentarian says. We just do what we want to do regardless.

Mr. WELLER. Senator, if you make the rule, you can change it.

Senator BAUCUS. Do you see any constitutional separation of powers problems if Congress for one reason or another does not authorize the funds for the courts to operate?

Judge HUNTER. Well, depending on how severe the cut——

Senator BAUCUS. Well, if the bill just doesn't pass. Say there is a required annual authorization and an annual appropriation and one of them doesn't pass.

Judge HUNTER. We had that occur one time, Senator. There was an Attorney General's opinion that said that although there were appropriations involved, the obligation to continue the judicial service remained, and the obligation to pay for it remained.

How far that goes, I have no idea. Certainly, if the withholding of funds totally impaired the court system so that it could no longer carry out its constitutional functions, it would be a serious constitutional question which I suppose only the Supreme Court could finally answer.

It is very worrisome, but I just cannot conceive that such a circumstance would intentionally happen. It might happen unintentionally or by accident, yes.

Mr. BAUCUS. Thank you very much. I will not take any more time. Thank you.

Senator DOLE. Senator Grassley?

Senator GRASSLEY. Following up on this same point, you contend that it might interfere with the judiciary's independence. Along those lines, I would like to have you comment on the proposal that Mr. Dowd is going to give in his testimony that the authorization process be limited to areas where the judicial branch acts as an administrator or an employer or an employee or in some other nonjudicial capacity, therefore, exempting the areas of judicial case selection and decisionmaking.

Judge HUNTER. Senator, I am somewhat at a disadvantage. I have not seen the document to which you refer. I would like to see it and think about it, and I would be glad to answer in writing.

Senator GRASSLEY. Well, what about from a conceptual standpoint? Well, I guess that is all right. Submit it in writing then.

[Judge Hunter's response to Senator Grassley's question, which was subsequently submitted for the record, follows:]

RESPONSE OF JUDGE HUNTER TO SENATOR GRASSLEY'S QUESTION

Mr. Dowd's expressed concern at page 7 of his prepared statement, related to Congressional inquiries into case decision processes, is one which I share. I do not believe judges should be cross-examined concerning the thought process involved in case deliberation; I believe published judicial opinions speak quite adequately for themselves. I am not, however, thoroughly in agreement with Mr. Dowd's assertion that case decisional procedures and processes and administrative decisions are fully severable. In past years, before the Senate Judiciary Committee in the 96th Congress, I explained that administrative decisions may occasionally impact upon development of decisional law. I specifically offered as one example of the interplay between administration and development of the "law of the circuit", the Fifth Circuit Court of Appeals practice of assigning to the same three-judge panel cases involving civil rights issues which require more than one examination by the court. That practice was instituted by the judges in their administrative capacities as a management technique in support of the expeditious conduct of the court's business, yet it clearly has over time facilitated a rational development of the law of the circuit.

Even were we able to clearly delineate all administrative activity from all case activity, I do not believe such a delineation would in any way enhance the alleged need for legislation such as S. 1847. In my opinion, existing Congressional processes and procedures are not only adequate; they are far superior in many ways to a statutorily mandated annual program authorization framework. My objections to a mandatory annual program authorization are not limited to that process' potential inherent "chilling effect"; I simply do not believe such a procedure to be necessary. I do not believe either the Judiciary or Congress needs to assume the unnecessary burden inherent in that process. In any event, I do not believe that an innocently misleading distinction between administrative and adjudicatory proceedings would, in application, serve either the judicial or legislative branches well.

Judge BORK. Senator, may I ask——

Senator GRASSLEY. Judge Bork?

Judge BORK. Does this mean that support personnel in the courts would go through the authorization process?

Senator GRASSLEY. Well, it would be more than just staff, other than just court personnel as well. The whole process would go through the authorization, but it would be exempting areas that affect your judicial case selection and those things that maybe in turn you would see infringing upon decisionmaking.

Judge BORK. Well, if I may just respond tentatively to it, it seems to me that courts obviously cannot operate without supporting personnel. If authorizations or appropriations were delayed for that area, you would either almost stop or stop the judicial system from operating.

Senator GRASSLEY. What you are saying is that to that extent it is not much of a compromise.

Judge BORK. I think not, as I understand it.

Senator GRASSLEY. Yes.

Senator DOLE. Thank you very much. I don't think anybody here suggests that judges are overpaid. Certainly, I don't. We are all in sort of the same boat. There are many people in the public who do not

think we should be paid at all, and judges should be paid 10 percent more or less, depending on your point of view and the judge's point of view. There is the feeling that *many judges become legislators* rather than interpretors of the Constitution, and that does frustrate some with, I think, some justification.

I am not certain we can resolve all those questions based on philosophy, but I certainly understand why you would be concerned if it became an effort to nitpick with everything that happened in the system.

On the other hand, once we have New Federalism completed, there will be so much more time here that we will just have time on our hands. We will not be worrying about potholes and sewer grants and we can look more closely at some of the national problems. Certainly, the judiciary is an area that I think has not been focused on enough. I don't mean this in a critical—I mean it in a constructive way. That will be a few years, and maybe we can change it to a 5-year program instead of a annual program. Would that make it any less offensive if we did it every 5 years?

The fact that you have two committees looking at the same subject matter is not unprecedented. I think there are 30 hearings going on on El Salvador right now. Everybody who can figure out some way to get a piece of the action knows that is nightly news material because the media likes that kind of stuff. Everybody who can find a way to do it is having hearings on El Salvador. Of course, the budget is fairly important, too.

Are you just opposed to the principle or because it is on an annual basis?

Mr. WELLER. Senator, I think that the judiciary has consistently welcomed an increasing amount of oversight; it is oversight, however, as distinguished from an annual program authorization requirement.

The concerns that have been expressed this morning go to the heart of that program authorization on an annual basis. We, in fact, would welcome a considerable increase in oversight. The problems do need congressional attention.

Senator DOLE. Now, with reference to the salary portion, as I understand, your primary concern there is one of drafting. It might not only be automatic increases but also increases that might be properly suggested through the statutory procedure.

Mr. WELLER. Yes, sir. If the problem is, in fact—as it appears to be—the comparability adjustment machinery—we are recommending that you expressly repair that and not push the Supreme Court into having to resolve language which might create other problems.

Senator DOLE. That is not opposed to our review of salaries. It is the way——

Mr. WELLER. The Judicial Conference acknowledges your superiority, but we haven't figured out a way to increase our own. Let's face it. It is not quite so dangerous to increase yours; however, we try to be innovative. We are looking at other ways to increase ours.

Judge HUNTER. Senator, I cannot let this opportunity pass by without saying it. If you really want to do something to hold down on the need for creating new Federal judgeships, which is a perennial prob-

lem, take a serious look again at diversity. If you would get rid of diversity jurisdiction in the Federal court system, you would save somewhere between 20 and 25 percent of the caseload and over 50 percent of a judge's trial time, because diversity cases, for some reason, go to trial more often than any other kind, and they are taking over half of a district court judge's trial time. We look upon these as matters that properly belong in the State system. They don't involve Federal questions and Federal constitutional matters.

Senator DOLE. That is an area that I know we have been asked to look at. Maybe you could visit with Senator Heflin before you leave town. He has a different view on that as a member of this subcommittee.

In any event, there is some movement now on the House side. I think that it is a question of whether we should have—I hope we can find time to have some hearings this year on that question.

With reference to additional judgeships, at the recent Williamsburg Conference, I understand that the Chief Justice agreed to supply Senator Thurmond with justification material on the pending request of the Judicial Conference for 43 additional judgeships.

Do you have any material that you would like to submit at this time, any additional material on justification for those additional judgeships?

Mr. WELLER. Senator, we are scheduled to deliver that material to Senator Thurmond next week. We will be happy to make copies available to this subcommittee.

Senator DOLE. Is it still 43 or has there been one added? Oh, I see. I guess that our subcommittee has added one.

Mr. WELLER. The conference has in no way changed its request.

Senator DOLE. There has been no addition.

Mr. WELLER. That is correct.

Senator DOLE. What about the general question of limiting the jurisdiction of courts. This is one of the things that we are doing right now on the Senate floor as far as busing is concerned. Does that bother one of the judges, that Congress occasionally gets into areas that in effect limit your jurisdiction?

Judge HUNTER. Senator, those are basically social issues which belong to the Congress, just so the method is not unacceptable, constitutionally speaking. Judges do not pretend to have the vision or the tools, the duty, or the capability of the Congress. Those very difficult questions properly belong with the Congress.

Judge BORK. I don't think in that area, Senator, it is troublesome. Congress traditionally has power over judicial remedies, but perhaps it does not have power to eliminate them altogether. It has power to modify them.

In addition to that traditional historical power, Congress has an explicit power under section 5 of the 14th amendment in the field you are talking about.

Senator DOLE. Well, I think it has been raised recently because of the *Bob Jones* and the *Goldsborough* cases where the matter came to the Finance Committee. It occurred to us very quickly that we were not going to be able to solve it in the Finance Committee. We had some who would normally want to limit the jurisdiction of the courts trying to figure out a way to get the court to hear the case. House Ad-

ministration has taken still another position in that matter. I guess probably Congress is not always consistent depending on what may or may not be happening.

Well, I think that I understand the concern with the authorization. I think I now understand that we might correct the drafting error and the salary part of the Helms' bill and a number of others have an interest in that.

Do you have any general observations on the future of the judiciary in relation to Congress, any areas that we have failed to focus on? I do not suggest that we are doing the things that we should either. If there are areas you feel that we should address, it would be very helpful if you comment on that.

Judge HUNTER. Senator, as Mr. Weller indicated, we welcome oversight as a general proposition. We are getting a good deal of it now. If more is felt necessary, the judiciary would fully cooperate. It has fully cooperated.

I do not know of a single subject that Congress has not touched on or doesn't have in its bosom at the present time. I have nothing to add to that.

I think the court system has been very carefully looked at, analyzed, and given appropriate attention.

Senator DOLE. You did mention that we should probably focus on the diversity issue. There may be others that take a lot of your time that could be——

Judge HUNTER. There are other areas, I am sure, but they are being looked at. They are difficult areas because they involve constitutional concepts. However, our biggest timetaker from the standpoint of a trial judge in the Federal judiciary lies with the people who file pro se, particularly the inmates of penitentiaries and insane institutions. That is, I hope, receiving a good deal of attention, because that is one of our largest problems, if not the largest.

Senator DOLE. Another area that we may be addressing, hopefully, is the survivors benefits. Senator Thurmond introduced a bill on that.

Mr. WELLER. Yes, Senator. I think we all misunderstood your question a moment ago. Those matters of policy of concern to the Judicial Conference, on which we welcome and request attention, are already before the committees of both Houses; and we are not anticipating sending anything forward in the second session of significant quantity other than matters already here that have not been completed yet.

Judge BORK. Senator, I just want to restress again what I said. It is not just diversity jurisdiction. In my opinion, the Federal judiciary is already much too large to do the function that it should be doing. We have 23 judges in the Ninth Circuit Court of Appeals. That can hardly be called a court anymore. They no longer sit together to resolve issues.

I think the whole issue of Federal jurisdiction, not just diversity, but what should be a Federal crime is of importance. There are a lot of crimes that are now triable in Federal courts that do not belong there. Disputes like social security disability claims which require very simple determinations do not require article III courts. You

could reduce the jurisdiction of the Federal courts very drastically, and I think, with great benefit if it were done properly.

Senator DOLE. I am just reminded that there are approximately 100,000 black lung cases now pending in Federal court which I assume could properly be handled by administrative law procedure or something.

Judge BORK. Yes.

Senator DOLE. I think those are areas that we should probably focus on. It would be helpful to the court. It might help to streamline the process.

How many judges do you say you have?

Judge BORK. Twenty-three judges in the Ninth Circuit Court of Appeals alone, which means that when they have an internal conflict between their panels, they cannot even sit en banc to resolve it. They have a partial en banc procedure with people drawn by lot. It is a very unsatisfactory way of proceeding, but under the present jurisdiction, there is no alternative. If it keeps going this way, it will keep getting larger and less satisfactory.

Senator DOLE. And, I think that Senator Grassley mentioned you suggested a cost of——

Senator GRASSLEY. It was $777.6 million.

Senator DOLE. Certainly, in this time of budget scrutiny, I don't suggest that every dime cannot be justified, but I would assume that you understand the pressures on the Congress including our own committee staff in which we have taken reductions. Last year it was 10 percent. I am just suggesting that we are not singling out any area and say, "Well, we are going to go after the judiciary this year and somebody else next year." I assume the Appropriations Committee really focuses on total expenditures, but, again, when we are dealing with a budget as large as ours, it is hard for me to believe that there is enough time in the appropriations process to really focus on areas that might be reduced not only in your branch but in our branch. There just is not time. That is one of the reasons for Senator Helms' proposal.

Mr. HEISING. If I may, Senator—I spent most of yesterday, from 10 in the morning to 4 in the afternoon, before the Appropriations Subcommittee for State, Commerce, Justice, and the Judiciary. I can assure you, sir, that a lot of questions were asked. They were questions in depth relative to the costs of the judiciary. We were also given a lot of questions to answer for the record.

The hearing will be continued on March 9, at which time the Supreme Court will also be heard by that same subcommittee. On April 15, the Senate Appropriations Subcommittee will also hear us.

Every year, sir, I can assure you that they raise very profound questions—and very narrowly focused questions—on our expenditures.

Senator DOLE. That is not too long to spend when you are talking about three quarters of a billion dollars of the taxpayers' money, but, again, I have been around here long enough to know that sometimes we get off on a tangent and never really focus on what we should be focusing on. There may be something that we have read in the papers. We get you up here and spend an hour on that and never really focus on whether or not there are areas where we could streamline the reporting process, for example, and save money. We have done it in our

committee. We found out that the reporting process was not competitive. There are a number of just housekeeping areas that I don't think we should go into. Maybe you could do it on your own. These are areas that could save tax dollars. Maybe a few million here and there do not add up, but they seem to when you have got a deficit as large as ours. Well, I will not get into all of that, but are there other areas that we did not touch on which either of the judges would like to comment on?

Mr. WELLER. Senator, I cannot resist the opportunity to point out that the real problem with the budget of the judiciary is the problem that the rest of the Government has. It is growth. The primary responsibility for limiting that growth lies with limitations on access to the courts—rational limitations. Diversity has been mentioned today as one very influential alternative.

That responsibility does lie with the Judiciary Committee more than any other, rather than Appropriations. A start to solving the problems would begin here.

Senator DOLE. That would sort of be new federalism, in a sense. You would be returning some of those functions to States where they belong, but then you would still have the big bureaucracy with nothing to do.

Judge BORK. Time will cure much of that, Senator.

Senator DOLE. Pardon?

Judge BORK. Time will cure the size of the bureaucracy.

Senator DOLE. We hope so.

Mr. WELLER. And if the growth in Federal question caseload, which we have seen over recent years, is continued only in part to the extent we have seen it in the last decade, what is now in place will remain necessary for quite some time.

Senator DOLE. I understand that, but we are making some inroads on the size of the Federal Government. We are all part of the Federal Government.

Well, are there any other matters? Did you have a written statement?

Judge HUNTER. I have a written statement. At this time, I would ask permission to have it filed.

Judge BORK. I am in the same position, Senator.

Senator DOLE. Now, do you gentlemen have any written statements?

Mr. WELLER. No, sir.

Mr. HEISING. No.

Senator DOLE. You are here in a supporting role?

Mr. WELLER. That is correct.

Mr. HEISING. Yes.

Senator DOLE. Are there any areas that you wanted to touch on?

Mr. WELLER. No, sir.

Senator DOLE. Well, we appreciate very much—oh, excuse me.

Senator BAUCUS. Thank you, Mr. Chairman. I have one question—two, actually. I understand. If I were in your shoes, I would have the same point of view. You like oversight, but not the kind of oversight that is in this bill.

What other oversight suggestions do you have? What should we do? We cannot call the judges up here and talk to them about past and pending cases.

Mr. WELLER. Senator, there is a model that you can follow that has been established in the House of Representatives by that House's counterpart Subcommittee on Courts, Civil Liberties, and the Administration of Justice. In the past three Congresses, Mr. Kastenmeier's subcommittee has scheduled oversight on the judicial branch, and he has, from time to time, quite narrowly focused. This past May, he looked specifically at the manner in which the Judicial Conference and the Administrative Office perform their duties and interact. In past hearings, he has looked specifically at the mission of the Federal Judicial Center.

That type of an approach each year serves his committee as an educational process. The Senate has never really taken that kind of approach. It has approached things from a substantive proposal point of view. Judgeships is the most comprehensive approach. Magistrates is a less comprehensive approach. The pattern is there if you choose to follow it.

Senator BAUCUS. Other than the appointment process and the constitutional-amendment process, are there any other ways for Congress to responsibly address the decisions of the Federal judiciary?

Mr. WELLER. In individual case decisions?

Senator BAUCUS. Yes.

Mr. WELLER. I think there would be some problems with that degree of congressional——

Senator BAUCUS. I am talking about the constitutional questions. Obviously, Congress can change the result in cases interpreting statutes.

Mr. WELLER. The Judicial Conference has scrupulously stayed away from formulating an opinion on this pending policy issue so far. I do not feel adequate to address it this morning. I do perceive real dangers in a committee investigation of individual case decisions to too great an extent. The court's opinions speak for themselves on law on the record. Congress evaluation of those opinions is certainly proper and appropriate. Congress may wish to step in and take some action to change the consequences. Bringing a judge in before the Senate Judiciary Committee, moreover, and asking him to explain the decisional processes that went into his consideration of the opinion, I think, is not appropriate.

Senator BAUCUS. Did you want to add something, Judge Bork?

Judge BORK. No. I just wanted to clarify something. I was asked a question about congressional power before and responded to it because I had said it many times before I became a judge, and it is on the record anyway.

Judge HUNTER. Senator, I think I should also make the point that Mr. Weller was making. The Judicial Conference of the United States is not a court and it does not have the authority of a court. It simply does not render advisory opinions or get into that type of thing at all. I join Mr. Weller in saying that I am not prepared to answer the question you asked either, but I think Mr. Weller's answer went as far as any individual on the conference could go.

Senator BAUCUS. I suggest that if there is some way we can address that question, it might take off some of the pressure behind these bills. That is why I asked the question.

Mr. Chairman, I understand that this bill, without any action by your subcommittee or Senator Grassley's subcommittee, automatically goes to full committee on March 1. Because of all these questions, I am wondering whether it might make some sense for us to request a delay in that automatic bumpup date.

Senator DOLE. Is there any way we can change that date? We have just had the hearing.

Senator BAUCUS. It is my understanding that the bill will automatically go to the full committee.

Senator DOLE. It would seem to me that based on the suggestions here, we may want to look into these things further. Is there some urgency about this? Do they have to get another raise or something?

I think we can probably accommodate a reasonable extension so we can look at some of the changes. We will make the request to Senator Thurmond and the chairman.

Are there any other matters? Well, thank you very much. We appreciate it.

Judge HUNTER. Thank you.

Senator DOLE. I am sorry that we were somewhat delayed.

Judge BORK. Thank you, Mr. Chairman.

[The prepared statement and submissions of Mr. Hunter and Mr. Bork follow:]

STATEMENT

OF

HONORABLE ELMO B. HUNTER
CHAIRMAN
COMMITTEE ON COURT ADMINISTRATION
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES

INTRODUCTION

Mr. Chairmen, on behalf of the Judicial Conference, let me thank you for this opportunity to comment upon the "Federal Salary Control Act of 1981", S. 1847. I am appearing here today in the same capacity in which I have testified before both the House and Senate Judiciary Committees on numerous occasions in the past six years -- as Chairman of the Judicial Conference's standing Committee on Court Administration. On several occasions in recent years, I have submitted, as an exhibit accompanying my testimony, a chart displaying the Judicial Conference's standing and special committees; I again today file that exhibit (See Appendix A).

The Court Administration Committee which I chair has traditionally reviewed more proposed legislation at the request of Congress than all other Conference committees combined. At its most recent meeting, in late January, the committee evaluated S. 1847 and concluded that it should not be enacted -- primarily because the purposes to be served by the legislation either are already being adequately served by existing Congressional processes and procedures, or should be achieved through legislative approaches other than those incorporated in S. 1847. Enactment of the legislation might well also generate a series of fundamental policy questions for both the judicial and legislative branches which ultimately could only be resolved by the Supreme Court itself. Since its creation in 1922, the Judicial Conference of the United States has consistently advised Congress to avoid, if at all possible, such constitutional confrontations. My committee's conclusions will be formally considered by the Judicial Conference when it convenes here in Washington for its semi-annual Proceedings precisely two weeks from today.

In addition to the recommendations concerning S. 1847 which will be presented from my committee, the Conference will also be considering a report filed by its Committee on the Judicial Branch, chaired by Judge Irving R. Kaufman. Judge Kaufman's Committee also has strongly urged the Judicial Conference to recommend that the bill not be enacted. I am confident the Judicial Conference will adopt the recommendations which both committees have already filed.

As noted by the bill's sponsor, Senator Helms -- and as noted in your jointly signed letter of invitation of February 1 -- S. 1847 is intended to achieve two purposes. In Senator Helms' words, the bill would, first, "set up an authorizing process for appropriating funds to Federal courts", and second, "put an end to automatic pay raises for Federal judges". Senator Helms has premised the need for the bill upon the following presumption:

> Under present law the executive branch and not the Congress sets the salaries and budgets of these judges and their staffs . . . .
>
> Congress has little chance to form its own coherent budget policy for the judiciary.
>
> See 127 CONG. REC. S 13328 (daily ed. Nov. 12, 1981)

That presumption is not valid. Congress annually reviews in great detail, modifies and approves a complete budget for the entire judicial branch of government. Congress also, under existing statutory provisions, holds an *absolute* power to approve or disapprove all *increases* in judicial salaries in accordance with procedures which Congress itself deliberately embodied in those statutory provisions.

In explaining the conclusions reached by both the Court Administration Committee and the Committee on the Judicial Branch, I will address each of the bill's purposes individually.

ANNUAL APPROPRIATIONS AUTHORIZATION

Forty-five years ago, President Franklin Roosevelt, exasperated by decisions of the Supreme Court which had ruled New Deal initiatives unconstitutional, recommended what we now refer to as a "packing plan" to render the Federal judiciary, specifically the Supreme Court, more politically accountable. President Roosevelt's initiative failed -- and the passage of time has seen the development of an almost

unanimous consensus that it should have failed. Ironically, his initiative also led directly to the formal establishment of Congressional appropriations processes which today control the expenditure of every dollar in support of the Third Branch of Government -- processes and procedures which the judiciary has never resisted, and does not today resist. We believe they obviate the need for the legislation presently pending before you.

The creation of the Administrative Office was both a direct outgrowth of the Roosevelt "packing scheme" and the genesis of *direct* Congressional oversight of every feature of the judiciary budget. Prior to the Administrative Office Act of 1939, the Department of Justice prepared the judiciary's budget, shepherded it through Congress, and administered it. One of Congress' fundamental purposes in enacting the 1939 Act was the elimination of the Department of Justice as "controlling fiduciary" for a constitutionally independent and separate branch. Senator Helms' statement that "under present law the executive branch and not Congress sets the salaries and budgets of these judges and their staffs" and that, therefore, "Congress has little chance to form its own coherent budget policy for the judiciary" is in error. For 42 years now Congress has in fact controlled both salaries and budgets for the judicial branch, and present practices are not only "coherent" -- they are extensively comprehensive and appropriately pervasive. While I will address the specific elements which constitute Congress' exercise of authority over judicial salaries subject to the limits set by Article III of the Constitution in a moment, let me now explain, in the most general terms, the manner in which judicial branch's annual appropriations authorization is routinely processed by Congress every year.

## THE BUDGET PROCESS FOR THE JUDICIARY

As in many Executive Branch agencies, the budget cycle for the judiciary is approximately 30 months long. For FY 1984, the cycle will begin on April 1, 1982 and end on September 30, 1984. The budget cycle consists of three phases -- formulation, presentation, and execution. During formulation, the Administrative Office consolidates

the funding requirements of the judiciary and presents them to the Judicial Conference for approval. During presentation of the budget the Judiciary transmits the approved requirements to the Office of Management and Budget (OMB) and the Congressional Appropriations Committees -- and then answers questions regarding the estimates at Congressional hearings. The execution phase entails monitoring expenditures to preclude violating the Antideficiency Act (31 U.S.C. 665). During the execution phase, any significant variation in program expenditures must be authorized by the Appropriations Committees. From time to time, supplemental appropriations may also be sought from Congress for unexpected or emergency requirements.

Formulation

A budget call is sent to Chief Judges of all courts on April 1, asking them to submit their manpower requirements based on projected workloads. The courts are also asked to estimate their requirements for other support needs -- such as furniture and furnishings, travel, equipment, and contract court reporters. The responses are analyzed by the program divisons and Budget Branch of the Administrative Office to determine whether the requests are justified. Subsequently, revised requirements are submitted to the committees of the Judicial Conference, including the Budget Committee, which reviews the requests and later transmits them with recommendations to the Judicial Conference. Following Judicial Conference action on the budget in September, the Budget Branch prepares detailed justifications for each funding request which will be submitted to the Appropriations Committees. This document, which is prepared in a format approved by appropriation committee staff, contains the funding requirements for the courts by appropriation, including Salaries of Judges, Salaries of Supporting Personnel, and Expenses of Operation and Maintenance of the Courts. Simultaneously, the Budget Branch prepares OMB schedules of the judiciary's funding requirements which are incorporated into the President's budget. OMB by statute may *not* change the judiciary's request, although it may provide comments to the Congressional Appropriations Committees.

Presentation

The House Appropriations Subcommittee for Commerce, Justice, State, the Judiciary, and Related Agencies generally holds its hearings on the Judiciary in February. The Senate Subcommittee hearings follow the House hearings within a month or two. The House hearings are often a day and a half in length and all of the appropriations are addressed, including the Supreme Court, the three national courts, the appropriations making up the funding for the Courts of Appeals, District Courts, and Other Judicial Services, and those of the Administrative Office and the Federal Judicial Center. The Chairman of the Budget Committee of the Judicial Conference, with support from Administrative Office staff, presents the judiciary's budget and answers questions posed by the Committee Chairman and Members. Yesterday the House Subcommittee conducted just such a hearing for our budget for fiscal year 1983. Appropriations Subcommittee Members and staff in both Houses have, over the years, clearly evidenced their belief that they exercise a special oversight responsibility regarding judiciary expenditures. Committee Members have also said that the judiciary's requirements have generally been modest. In fact, since the series of hearings commenced in 1940, the judiciary's "share" of the entire federal budget has never exceeded one-tenth of one percent in any year. See Appendix B to this statement.

Both the House and the Senate Reports on the Appropriations Bills are often quite specific in spelling out the intent of the Committees when approving or denying funds for the judiciary. Additional clarification may be sought or obtained from the Committees by the Administrative Office through correspondence and conversations with staff.

Execution

To control the expenditures of the judiciary, procedures are employed by the Administrative Office which require an authorization for the hiring of personnel, the purchasing of equipment and furniture, or any procurement action which will commit or obligate judiciary funds. Those authorizations are made based upon availability of funds appropriated

by Congress, and all expenditures are closely monitored to insure that the authorizations are not exceeded.

Occasions may arise when the level of expenditures in a certain program is higher than anticipated at the time the budget was submitted to Congress. If this increase is greater than $250,000 or 10 percent of the program funding level, whichever is less, the judiciary may request reprogramming authority from the Appropriations Committees. Reprogramming authority will permit the movement of funds from one program activity to another within the same appropriation. For example, during FY 1981 there was a substantial increase in expenditures for travel by judges and other judicial officers and employees as a direct result of a higher subsistence and mileage allowance authorized by Congress on September 10, 1980. Because a considerable amount of judiciary travel is unpredictable and essential to the operation of the courts, the judiciary sought and obtained approval from the Appropriations Committees to reprogram 1981 funds to absorb the resulting increase in travel expenditures.

In addition to seeking reprogramming, when new legislation is passed very quickly or when events occur which could not have been anticipated--and funding is insufficient to meet the new or unexpected needs--the judiciary may ask Congress for supplemental appropriations. For example, a supplemental appropriation request was made following passage of the Court Interpreters Act (Public Law 95-539) on October 28, 1978. The Act provided that qualified interpreters should be available to all parties needing their assistance in Federal courts. In order to fund this program during the remainder of 1979 and have sufficient funds in the 1980 budget which had already been submitted to OMB, a supplemental appropriation request for FY 1979 and a budget amendment for FY 1980 were sent to Congress.

When faced with funding requirements in excess of availability, the judiciary more often reduces its level of expenditures by reducing hiring, not filling vacancies, and limiting procurement. These precautions were taken last year when the number of bankruptcy case filings increased by 24 percent and expenditures began to rise accordingly. Similarly, the judiciary is reducing its rate of expenditures this year in spite

of rising caseloads by postponing the filling of vacancies and new positions to avoid a deficiency.

Comprehensive and Coherent Congressional Action

Obviously, the two Appropriations Committees do "set up specific financial guidelines" in performing their appropriate roles in "supplying funds for operating and maintaining the judiciary." Were they to devote as much time and effort to oversight of the ninety-nine and nine-tenths of the federal budget which is expended by the rest of the federal government, they would never be able to fully perform their duties. In part, they are able to devote such a disproportionate relative amount of their attention to the judiciary's budget because the judiciary fully cooperates with their processes and procedures.

I would remind you that the courts are primarily service oriented. They exist to resolve disputes among citizens and between individuals and government -- to provide a neutral apolitical forum for every citizen who believes he or she has suffered an actionable wrong for which the law has provided a remedy.

I would also note that much of the judiciary's budget is what has recently been characterized as "uncontrollable". Regardless of differing views concerning *increases* in judicial salaries, the Constitution precludes *decreases* in those salaries. The representation of criminal defendants and other persons pursuant to the Criminal Justice Act is "uncontrollable" because the rates of compensation for court-appointed counsel are established by law subject to limitations based on the nature of the offense. The budgetary requirements for the implementation of that Act naturally are dependent upon the number of persons who are prosecuted and who qualify financially for such representation. Expenditures relating to petit and grand juries are also largely "uncontrollable"; Litigants in both civil and criminal cases have a constitutional right to a jury trial and the fees and allowances of jurors are fixed by the Congress. Grand juries are convened at the request of United States Attorneys and, therefore, our budgetary requirements as they relate to grand jurors in large measure are governed by the policies of the Department of Justice. These appropriations which are mandatory in nature represent

approximately 40 percent of the judiciary budget.

Furthermore, approximately 60 percent of the increase in our budgetary requirements in the last year represent what are referred to by the Appropriations Committees as "adjustments to base and built-in changes." These adjustments represent increases in the cost of operations without corresponding increases in productivity or in the level of services being provided to the general public. The judiciary is subject to the pressures of inflation as are other agencies of the Government. Aside from general pay increases, we are subject to the recurring annual cost of within-grade salary advancements, billings for space by GSA, increases in Federal Telecommunications System charges, and other increases in contract rates and charges for supplies and services. These so-called adjustments to base cannot be absorbed without serious adverse effects on the operation of the courts.

Program increases which relate to requests for additional supporting personnel, such as probation officers and staff, deputy clerks, bankruptcy clerks, and librarians are based on staffing formulas adopted by the Judicial Conference after very extensive and detailed work measurement studies conducted to determine the amount of effort involved in the processing of cases. Those staffing requirements are based entirely on projected case filings and other work which is "uncontrollable". Criminal case filings increase or decrease at the discretion of the Department of Justice. Access to the courts by civil litigants is governed by law, and the courts have virtually no control over the number of cases filed. The number of probationers and parolees under the supervision of probation officers likewise is "uncontrollable". The substantial increase in bankruptcy case filings, in some measure, is due to the Bankruptcy Reform Act -- but it is also due to the current state of our economy. All litigants, civil and criminal, are entitled to a speedy trial. If the courts are not provided with adequate supporting personnel, the disposition of cases is delayed and a critical backlog of pending cases developes which denies litigants their "day in court" for months or years.

The Appropriations Committees review our budgetary requirements in considerable detail because they are fully cognizant of those

"uncontrollable" factors. They are responsive to the courts' needs because the services provided by the courts are essential to the preservation of freedom and justice under our Constitution. If the courts cannot function -- if the delivery of those mundane services which render justice a reality -- albeit not always a perfect reality -- rather than a mere ideal -- are impeded, the majority opinion of the moment may adequately protect many for a while. It may also, however, the more easily tyrannize the few -- and will eventually render the "social contract" under which we live in freedom meaningless. The power to "regulate appropriations", like any other power, can be abused. Congress recognized that danger when it created the present appropriations procedures for the judiciary in 1939. The Appropriations Committees have consistently been sensitive of it in their detailed work, insuring that the courts are able to serve citizens adequately without expending appropriated funds imprudently.

In evaluating S. 1847, the members of the Judicial Conference's Court Administration Committee and its Committee on the Judicial Branch concluded that, were the Senate and House Judiciary Committees to undertake each year the burden of a complete duplication of the roles now played by the two Appropriations Committees, there would be little benefit to Congress. We see no compelling need to present our budget four times each year rather than twice. We believe the time and resources available to both Judiciary Committees are too limited and too valuable to be devoted to duplicating the functions performed by the Appropriations Committees. We would certainly prefer to see that time and those resources devoted to what has become known as "program authorization" -- the long acknowledged and fully appropriate province of the Judiciary Committees. In recent years that function has grown -- and the Conference has welcomed it.

We studied Senator Helms' introductory remarks to ascertain if the bill's first "oversight objective" might actually be that of a mandatory annual *program* oversight by the Judiciary Committees. The following language in the sponsor's statement appears to contemplate such an objective:

> [The bill] excludes the Supreme Court from the general authorizing process, not because it would be unconstitutional to do otherwise, but because it would obviate the possibility of undue Congressional influence over fundamental judicial policy and decisions. Also, I believe it would be inappropriate to require annual authorization for the head of another separate branch and the only court created explicitly by the Constitution. Similarly, Congress has not made the President, the chief of the executive branch, subject to the annual authorization process.
>
> See 127 CONG. REC. S 13328 (daily ed. Nov. 12, 1981)

As I have already explained, the Supreme Court budget is fully reviewed by the Appropriations Committees, just as is the rest of the judiciary's budget. On March 9, Justices Powell and O'Connor are scheduled to appear before the House Appropriations subcommittee, just as justices do every year. Certainly, the "chief of the executive branch" is "subject to the annual authorization process" conducted by the Appropriations Committees; not long ago newspapers reported rather extensive Congressional review of requests for allegedly large increases in White House appropriations.

In his introductory remarks, Senator Helms also specifically noted that sections 3 and 4 of the bill were designed to "make courts of appeals, district courts, the Federal Judicial Center, and the Administrative Office of the U. S. Courts subject to Congress' annual authorizing process". In the context in which that specific language appears in the *Congressional Record*, the objective would appear to be strictly that of the *appropriations* authorization. Indeed, in concluding his introductory remarks, Senator Helms describes the bill as providing "a balanced means for legislative committees, and Congress as a whole, periodically to define budgetary objectives for the judiciary" and notes that "Congress will be able to specify a desired level of funding instead of hastily rushing to amend figures furnished by another branch of the Government".

Assuming -- on the basis of the brief reference to *program authorization* as distinguished from *appropriations authorization*, *implicit* rather than *express* in the language quoted, *supra* -- that the first objective of this bill is an *annual program* authorization for the entire Third Branch of Government *below* the Supreme Court, the

Judicial Conference's two committees also concluded that the bill should not be enacted -- because regular *program* oversight by both Judiciary Committees is already quite adequate, and *full* review *every year* quite unnecessary. Let me explain why we reached that conclusion.

TRADITIONAL PROGRAM AUTHORIZATION

Long before 1939 Congress commenced what we now discuss as "program authorization" for the federal courts. When Congress processed the first "Judiciary Act" almost two-hundred years ago (Act of Sept. 24, 1789, 1 Stat. 73) "program authorization" for the federal courts *below* the Supreme Court commenced. As I noted in my earlier comments, I have personally appeared before both Judiciary Committees to testify on pending legislation more than a dozen times in the past six years. Other judges routinely do so. Our testimony has been provided regarding legislation to create additional judgeships, bills to realign circuit courts of appeals, legislation to geographically realign district court jurisdictions, enabling legislation governing the Federal magistrates program, legislation reforming the bankruptcy law, bills to create new courts and abolish courts in need of jurisdictional revision -- such as the Act which the 96th Congress passed creating the Court of International Trade, and S. 1700, only recently passed by this Senate, creating a new Circuit Court for the Federal Circuit. I have personally appeared before Congressional committees on four separate occasions to explain the compelling need to abolish diversity jurisdiction. In every instance in which either of the two Judiciary Committees conducts such hearings, it performs an oversight function. You have but to examine the hearing records resulting from those hearings in the past six years to grasp the extent to which the Judiciary Committees routinely explore all aspects of Federal judicial branch administration.

In the past three Congresses, the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice has routinely conducted oversight hearings and published a record of those proceedings. I have personally testified at those proceedings, and Judge Bork who

accompanies me today contributed to that subcommittee's examination of the courts before becoming an Article III judge. I have welcomed the close scrutiny of the judiciary in those hearings -- and warmly commend Congressman Robert W. Kastenmeier, Chairman of the House Subcommittee, for his continued interest, concern, and constructive criticism. On May 6, 1981 I appeared at his last "program oversight" hearing and responded to his specific request for an explanation of "the role which the Judicial Conference of the United States performs on behalf of the Third Branch and the extent to which the Administrative Office performs its responsibilities under direct supervision of the Conference." My prepared statement for that hearing in this Congress addressed many of the questions which you may have concerning the development of the courts' relationship with Congress in terms of *program* authorization and oversight. I have included a copy as Appendix C to this statement.

The Directors of the Administrative Office and the Federal Judicial Center have routinely testified in both houses in recent years, and every year both Directors file with Congress an annual report. Every year the Director of the Administrative Office files with the Judiciary Committees records of proceedings of the Judicial Conference. Every year the Chief Justice forwards to each individual Member of both houses a year-end report of the state of the judiciary. In the opinion of my committee's members, there exists already a thoroughly satisfactory quantity of *annual program* as well as *annual appropriations* oversight.

Let me note for the record that the Judicial Conference has thoroughly cooperated in that oversight--and in fact has repeatedly sought and is now seeking more of it. On March 5 of last year we routinely transmitted a draft bill embodying recommendations for additional judicial positions which are a *biennial* product of standing Conference procedures. In *every* Congress our requests for judicial positions provides an opportunity for Congress to fully review the management and state of judicial branch business. Speaking only for myself, I wish that Congress would as conscienciously and regularly avail

itself of that opportunity for oversight as the Conference regularly provides it. We all should long ago have learned the hard lessons -- and the incredible financial costs -- of delaying the creation of additional judgeships for years. In April of last year, more than a dozen federal judges appeared before one of these two subcommittees -- the Subcommittee on Courts -- to fully explain the present need for judgeships and the inherent and inevitable costs of delay. I recommend the published hearing record of that proceeding as required reading for all Senators who were not able to attend the hearing -- and I sincerely thank Senator Dole for providing that opportunity for "program authorization". As I noted previously, we actively seek that regular *biennial* opportunity to appear here.

If we welcome such activity, why did we then conclude that S. 1847 is unnecessary? We do not believe a *statutorily* required *annual* oversight process will achieve anything more than you are already achieving under the *discretionary* exercise of your appropriate Congressional jurisdiction. In essence, you have the freedom now to schedule oversight hearings as you perceive them to be needed -- to tailor and fashion their range of inquiry and, when necessary, narrowly focus that range of inquiry. We believe that *flexibility* to be an asset permitting you to devote your scarce time and resources to those matters in need of immediate attention.

Furthermore, we are apprehensive that, in addition to wasting time and resources upon annual reiterations of identical material, there may be a danger of innocent and unintended -- but grave -- damage to the courts' abilities to perform their constitutionally mandated duties. If a *statute* requiring an annual program authorization -- and an annual authorizing bill -- for the district courts is enacted, what will happen to litigants and the federal criminal justice system if that bill fails of timely enactment? Do the district courts close? Do criminal defendants "walk" under the provisions of the Speedy Trial Act -- or is that Act "suspended", compelling their retention in a state of limbo under indictment for crimes that cannot be proven only because no forum exists? If the daily *availability* of our courts is essential to maintain the "access to justice" guaranteed by our Constitution and essential to the maintenance

of civil order -- and I personally believe it is -- what will be the consequences of a Congressional failure to approve an "annual program authorization" -- regardless of the reasons for that failure?

SALARY INCREASES FOR FEDERAL JUDGES

Clearly, the second purpose to be served by S. 1847 -- that of reforming Congressional processes governing the approval of salary increases for Federal judges -- is a purpose, up to a point, which is fully within the policy parameters of the legislative branch. Let me candidly advise you that every Federal judge who has served the courts in the past two decades is painfully cognizant of the fact that the Constitution only protects against *reductions* in judicial salaries, but does not guarantee *increases* in them. Those increases in judicial salaries which have caused comment since 1976, those which Senator Helms has characterized as "backdoor" increases, are not, however, *directly* the product of the Constitution. They are the product of Congress' enactment in 1975 of legislation (Act of Aug. 9, 1975, Pub. L. 94-82, Title II, §205, 89 Stat. 422, as amended (codified at 5 U.S.C. §5305)) which has since drawn into the annual political discussion of "comparability adjustments", Article III of the Constitution and the Supreme Court, as well as the inferior courts. I suggest to you that the cause of the dilemma is clear -- and so too is the solution: expressly amend the 1975 legislation.

In his introductory remarks, Senator Helms has stated that:

> Section 4 . . . of the bill . . . would put a stop to these backdoor increases for Justices of the Supreme Court and for judges of the inferior courts created by Congress.
>
> See 127 CONG. REC. S 13328 (daily ed. Nov. 12, 1981)

Section 4 of the bill provides that:

> Notwithstanding any other provision of law, judges, both of the Supreme Court and inferior Courts of the United States, shall receive, for their services, no increases in compensation during their continuance in office, or during their retirement therefrom, except as may be specifically provided by separate Act of Congress authorizing such increase and stating the amount thereof.

That *language* is indeed clear; yet its consequences are not. It *may* well achieve the objective of precluding the "comparability adjustments" --

also referred to as "October 1 cost-of-living increases" -- authorized under 5 U.S.C. §5305, those salary increases which Senator Helms has characterized as "backdoor" increases. Will it *also*, however, preclude judicial salary increases authorized by the Federal Salary Act of 1967 (2 U.S.C. §356) -- increases recommended by the Commission on Executive, Legislative, and Judicial Salaries (commonly referenced as the "Quadrennial Commission")?

Senator Helms' introductory remarks appear to be clearly directed to increases under 5 U.S.C. §5305, yet section 4 of the bill could be interpreted to reach increases in basic salary levels under 2 U.S.C. §356. Who may ultimately have to resolve the question if it is framed at law? The courts. Just as they were drawn *of necessity* into resolution of the issues raised in *Will v. U. S.*, 449 U.S. 200 (1980), our Supreme Court Justices might be drawn into resolving questions raised by section 4 of S. 1847. Members of the Court Administration and Judicial Branch Committees of the Judicial Conference therefore have unanimously recommended that, if Congress *should* conclude that revisions are needed in either 5 U.S.C. §5305 or 2 U.S.C. §356, it expressly amend those statutory provisions -- and avoid the ambiguous and uncertain *consequences* of enactment of the language now contained in section 4 of S. 1847.

SUMMARY

In conclusion, Mr. Chairmen, I believe I can summarize the reasons why all members of the Judicial Conference's two committees which have evaluated S. 1847 have unanimously recommended that the bill not be approved with three comments:

1. If the first purpose to be served is that of requiring an annual *appropriations* authorization, that purpose is already more than adequately being served by the routine practices and procedures followed by both the Senate and House Appropriations Committees in processing Title IV of the "Commerce, State, Justice and Judiciary" Appropriations Bill each year.

2. If the first purpose to be served is that of requiring an annual *program* authorization, that purpose is unnecessary

and unwise. Regular oversight procedures followed by the House and Senate Judiciary Committees are now (a) both adequate and more flexible and protective of resources -- Congress' and the Judiciary's -- than would be an annual *pro forma* ritual and (b) less potentially disruptive of the provision of fundamental judicial services to citizens than would be a statutorily required annual procedure that might fail of completion for a broad spectrum of unforeseen reasons.

3. If the second purpose to be served is that of revising existing statutorily mandated procedures for conferring annual "comparability adjustments" in judicial salaries, the precise statute mandating those procedures should be amended. The language in section 4 of S. 1847, while superficially clear, may all too easily lead to litigation which will *necessarily* again require the Supreme Court to act as it did in the *Will* case -- which prompted the introduction of section 4 of S. 1847.

On behalf of the Judicial Conference, I thank you for the opportunity to comment upon S. 1847 by participating in this hearing today.

# APPENDIX A

# JUDICIAL CONFERENCE COMMITTEES

As of October 1, 1981

## EXECUTIVE COMMITTEE

| | | Date of Appointment |
|---|---|---|
| James R. Browning | 9th Circuit | 10-13-78 |
| Oliver Seth | 10th Circuit | 3-5-80 |
| Collins J. Seitz | 3rd Circuit | 7-17-81 |
| S. Hugh Dillin | Indiana (S) | 8-28-80 |
| Albert G. Schatz | Nebraska | 8-28-80 |

## COMMITTEE ON COURT ADMINISTRATION

| | | | Date of Appointment | Date of Expiration |
|---|---|---|---|---|
| Elmo B. Hunter, Chairman | SJ | Missouri (W) | 1-1-78 | |
| *Bailey Brown | | 6th Circuit | 5-12-78 | |
| *Levin H. Campbell | | 1st Circuit | 3-3-75 | |
| Alfred T. Goodwin | | 9th Circuit | 1-1-77 | 1-1-83 |
| *Alvin B. Rubin | | 5th Circuit | 5-12-78 | 6-1-84 |
| **Edward A. Tamm | | DC Circuit | 2-12-70 | |
| Harlington Wood | | 7th Circuit | 10-1-81 | 10-1-85 |
| **Howard T. Markey | | CCPA | 6-6-79 | |
| *Charles A. Moye | | Georgia (N) | 10-1-80 | |
| Milton Pollack | | New York (S) | 1-1-71 | |
| *Carl B. Rubin | | Ohio (S) | 3-13-75 | 10-1-83 |
| *Charles E. Simons | | South Carolina | 12-15-80 | |
| Hubert I. Teitelbaum | | Pennsylvania (W) | 1-1-79 | 1-1-85 |
| Ralph G. Thompson | | Oklahoma (W) | 10-1-81 | 10-1-85 |
| George L. Hart, Jr. | SJ | District of Columbia | 3-13-75 | 10-1-83 |
| Glen E. Keller, Jr. | BJ | Colorado | 3-1-80 | 3-1-84 |

*Subcommittee chairmen
**Ex-officio members

## SUBCOMMITTEE ON FEDERAL JURISDICTION

| | | | Date of Appointment | Date of Expiration |
|---|---|---|---|---|
| Charles E. Simons, Chairman | | South Carolina | 12-15-80 | |
| James E. Barrett | | 10th Circuit | 5-12-78 | 1-1-82 |
| Raymond J. Broderick | | Pennsylvania (E) | 10-1-81 | 10-1-85 |
| Warren K. Urbom | | Nebraska | 3-31-75 | 10-1-83 |
| Nicholas J. Walinski | | Ohio (N) | 10-1-81 | 10-1-85 |
| Robert J. Warren | | Wisconsin (E) | 10-1-81 | 10-1-85 |
| Charles A. Wright | Prof. | Texas | 1-1-71 | 10-1-83 |

## SUBCOMMITTEE ON JUDICIAL STATISTICS

| | | Date of Appointment | Date of Expiration |
|---|---|---|---|
| Charles A. Moye, Chairman | Alabama (N) | 10-1-80 | |
| William H. Timbers | 2nd Circuit | 5-3-78 | 6-1-84 |
| James P. Churchill | Michigan (E) | 10-1-80 | 10-1-86 |
| Malcolm M. Lucas | California (C) | 1-1-77 | 1-1-83 |
| Tom Stagg | Louisiana (W) | 10-1-80 | 10-1-86 |

## SUBCOMMITTEE TO EXAMINE POSSIBLE ALTERNATIVES TO JURY TRIALS IN COMPLEX PROTRACTED CIVIL CASES

| | | | Date of Appointment |
|---|---|---|---|
| Alvin B. Rubin, Chairman | | 5th Circuit | 10-1-79 |
| John D. Butzner | | 4th Circuit | 10-1-79 |
| Ray McNichols | SJ | Idaho | 10-1-79 |
| Earl E. O'Connor | | Kansas | 10-1-79 |
| Milton Pollack | | New York (S) | 10-1-79 |

## SUBCOMMITTEE ON SUPPORTING PERSONNEL

| | | | Date of Appointment | Date of Expiration |
|---|---|---|---|---|
| Levin H. Campbell, Chairman | | 1st Circuit | 10-1-80 | |
| Roy L. Stephenson | | 8th Circuit | 5-12-78 | 1-1-84 |
| Daniel H. Huyett, 3rd | | Pennsylvania (E) | 6-6-79 | 1-1-83 |
| Walter T. McGovern | | Washington (W) | 10-1-80 | 10-1-86 |
| Robert W. Hemphill | SJ | South Carolina | 10-1-80 | 10-1-86 |
| John R. Blinn | BJ | Texas (S) | 3-1-80 | 3-1-84 |

## SUBCOMMITTEE ON JUDICIAL IMPROVEMENTS

| | | | Date of Appointment | Date of Expiration |
|---|---|---|---|---|
| Bailey Brown, Chairman | | 6th Circuit | 5-12-78 | |
| Robert F. Chapman | | 4th Circuit | 10-1-81 | 10-1-85 |
| Reynaldo G. Garza | | 5th Circuit | 7-1-79 | 7-1-85 |
| Paul H. Roney | | 11th Circuit | 5-12-78 | 6-1-84 |
| Aldon J. Anderson | | Utah | 7-1-79 | 7-1-85 |
| Malcolm Muir | | Pennsylvania (M) | 10-1-81 | 10-1-85 |
| Herbert Katz | BJ | California (S) | 3-1-80 | 3-1-84 |

## AD HOC COMMITTEE ON PRISONERS' LITIGATION

| | | Date of Appointment |
|---|---|---|
| Carl B. Rubin, Chairman | Ohio (S) | 11-20-80 |
| Alfred T. Goodwin | Oregon | 11-20-80 |
| Hubert T. Teitelbaum | Pennsylvania (W) | 11-20-80 |

## COMMITTEE ON THE JUDICIAL BRANCH

| | | | Date of Appointment |
|---|---|---|---|
| Irving R. Kaufman, Chairman | | 2nd Circuit | 12-1-79 |
| Arlin M. Adams | | 3rd Circuit | 12-1-79 |
| Robert A. Ainsworth | | 5th Circuit | 12-1-79 |
| Abner Mikva | | DC Circuit | 3-13-80 |
| J. Clifford Wallace | | 9th Circuit | 10-1-80 |
| James Harvey | | Michigan (E) | 12-1-79 |
| Irving Hill | SJ | California (C) | 12-1-79 |
| Oren Harris | SJ | Arkansas (E&W) | 12-1-79 |
| William H. Mulligan | Esq. | New York | 4-3-81 |
| Leonard Garment | Esq. | Washington, D.C. | 4-3-81 |

## COMMITTEE ON JUDICIAL ETHICS (Statutory)

| | | | Date of Appointment |
|---|---|---|---|
| Edward A. Tamm, Chairman | | DC Circuit | 11-8-78 |
| John D. Butzner, Jr. | | 4th Circuit | 3-1-80 |
| Frank M. Johnson, Jr. | | 11th Circuit | 11-8-78 |
| Bernard M. Decker | | Illinois (N) | 11-8-78 |
| Edward T. Gignoux | | Maine | 11-8-78 |
| William Wayne Justice | | Texas (E) | 11-8-78 |
| Prentice H. Marshall | | Illinois (N) | 3-19-79 |
| John H. Pratt | | District of Columbia | 3-19-79 |
| Alfred A. Arraj | SJ | Colorado | 11-8-78 |
| A. Sherman Christensen | SJ | Utah | 11-8-78 |

## ADVISORY COMMITTEE ON CODES OF CONDUCT

| | | | Date of Appointment |
|---|---|---|---|
| Howard T. Markey, Chairman | | CCPA | 3-19-79 |
| Peter T. Fay | | 11th Circuit | 3-19-79 |
| Damon J. Keith | | 6th Circuit | 3-19-79 |
| Anthony M. Kennedy | | 9th Circuit | 3-19-79 |
| Cornelia G. Kennedy | | 6th Circuit | 3-19-79 |
| Jon O. Newman | | 2nd Circuit | 6-11-79 |
| Frederick A. Daugherty | | Oklahoma (W, E & N) | 3-19-79 |
| John P. Fullam | | Pennsylvania (E) | 3-19-79 |
| * Foy Guin | | Alabama (N) | 10-1-80 |
| Charles E. Simons, Jr. | | South Carolina | 3-19-79 |
| William J. Jameson | SJ | Montana | 3-19-79 |
| Jacob Mishler | SJ | New York (S) | 3-19-79 |
| Robert Van Pelt | SJ | Nebraska | 6-11-79 |

91-266 O - 82 - 4

## COMMITTEE ON INTERCIRCUIT ASSIGNMENTS

| | | | Date of Appointment |
|---|---|---|---|
| George L. Hart, Jr. | SJ | District of Columbia | 1-1-77 |
| Robert L. Taylor | | Tennessee (E) | 1-1-77 |
| Gordon Thompson, Jr. | | California (S) | 1-1-77 |

## COMMITTEE ON THE BUDGET

| | | | Date of Appointment | Date of Expiration |
|---|---|---|---|---|
| Charles Clark, Chairman | | 5th Circuit | 2-5-81 | |
| Solomon Blatt, Jr. | | South Carolina | 8-1-77 | 10-1-83 |
| James Harvey | | Michigan (E) | 7-1-79 | 7-1-85 |
| Eldon B. Mahon | | Texas (N) | 3-13-75 | 10-1-83 |
| Robert E. Maxwell | | West Virginia (N) | 5-12-78 | |
| Robert F. Peckham | | California (N) | 7-1-79 | 7-1-85 |
| Oren Harris | SJ | Arkansas (W&E) | 1-1-71 | 10-1-83 |
| Ralph H. Kelley | SJ | Tennessee (E) | 3-1-80 | 3-1-84 |

## COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

| | | | Date of Appointment | Date of Expiration |
|---|---|---|---|---|
| Edward T. Gignoux, Chairman | | Maine | 10-1-80 | |
| Carl McGowan | SJ | DC Circuit | 1-1-73 | 7-1-82 |
| James S. Holden | | Vermont | 5-15-78 | 6-1-82 |
| Frank J. Remington | Prof. | Wisconsin | 1-3-75 | 10-1-83 |
| Bernard T. Ward | Prof. | Texas | 5-1-78 | 6-1-82 |
| Edward H. Hickey | Esq. | Illinois | 9-1-79 | 7-1-83 |
| Francis N. Marshall | Esq. | California | 1-3-75 | 7-1-82 |

## ADVISORY COMMITTEE ON APPELLATE RULES

| | | | Date of Appointment | Date of Expiration |
|---|---|---|---|---|
| Robert A. Ainsworth, Chairman | | 5th Circuit | 5-15-78 | |
| Charles Clark | | 11th Circuit | 7-1-79 | 7-1-82 |
| J. Smith Henley | | 8th Circuit | 5-1-78 | 6-1-82 |
| Pierce Lively | | 6th Circuit | 5-1-78 | 6-1-82 |
| Edward A. Tamm | | DC Circuit | 7-1-79 | 7-1-82 |
| Eugene A. Wright | | 9th Circuit | 5-1-78 | 6-1-82 |
| Bailey Aldrich | SJ | 1st Circuit | 11-6-73 | 6-1-82 |
| Henry J. Friendly | SJ | 2nd Circuit | 11-6-73 | 6-1-82 |
| Edward D. Re | | Int'l Trade, NY | 6-16-76 | 10-1-83 |
| Laurence C. Wallace | | Dep. Solicitor General | 4-11-80 | |
| E. Milton Farley, III | Esq. | Virginia | 11-6-73 | 6-1-82 |
| Abe Fortas | Esq. | District of Columbia | 2-15-74 | 6-1-82 |
| Ira C. Rothgerber | Esq. | Colorado | 11-6-73 | 6-1-82 |
| Walter V. Schaefer | Esq. | Illinois | 5-1-78 | 6-1-82 |
| Kenneth F. Ripple, Reporter | Esq. | Indiana | 6-1-78 | 6-1-82 |

## ADVISORY COMMITTEE ON BANKRUPTCY RULES

| | | | Date of Appointment | Date of Expiration |
|---|---|---|---|---|
| Ruggero J. Aldisert, Chairman | | 3rd Circuit | 12-1-78 | 12-1-82 |
| John T. Copenhaver, Jr. | | West Virginia (S) | 12-1-78 | 12-1-82 |
| Morey L. Sear | | Louisiana (E) | 12-1-78 | 12-1-82 |
| Clive W. Bare | BJ | Tennessee (E) | 12-1-78 | 12-1-82 |
| Asa S. Herzog Retired | BJ | Florida | 12-1-78 | 12-1-82 |
| Beryl E. McGuire | BJ | New York (N) | 12-1-78 | 12-1-82 |
| Alexander L. Paskay | BJ | Florida (M) | 12-1-78 | 12-1-82 |
| Robert Watson Foster | Prof. | South Carolina | 12-1-78 | 12-1-82 |
| Charles A. Horsky | Esq. | District of Columbia | 12-1-78 | 12-1-82 |
| Richard L. Levine | Esq. | Massachusetts | 11-1-79 | 11-1-82 |
| Norman H. Nachman | Esq. | Illinois | 12-1-78 | 12-1-82 |
| Joseph Patchan | Esq. | Ohio | 12-1-78 | 12-1-82 |
| Lawrence P. King Reporter | Prof. | New York | 1-1-79 | 1-1-83 |
| Walter J. Taggart Co-Reporter | Prof. | Pennsylvania | 1-1-79 | 1-1-83 |

## ADVISORY COMMITTEE ON CIVIL RULES

| | | | Date of Appointment | Date of Expiration |
|---|---|---|---|---|
| Walter R. Mansfield, Chairman | | 2nd Circuit | 5-15-78 | |
| Joseph F. Weis, Jr. | | 3rd Circuit | 10-1-80 | 10-1-84 |
| C.A. Muecke | | Arizona | 10-1-80 | 10-1-84 |
| Louis F. Oberdorfer | | District of Columbia | 6-11-71 | 10-1-81 |
| Philip Pratt | | Michigan (E) | 5-15-78 | 6-1-82 |
| Walter J. Skinner | | Massachusetts | 5-15-78 | 6-1-82 |
| A. Sherman Christensen | SJ | Utah | 6-11-71 | 10-1-81 |
| David J. Anderson | | DOJ (Civil Div.) | 9-21-81 | |
| David N. Henderson | Esq. | District of Columbia | 2-8-77 | 10-1-81 |
| Earl W. Kintner | Esq. | District of Columbia | 6-11-71 | 10-1-81 |
| William T. Kirby | Esq. | Illinois | 6-11-71 | 10-1-81 |
| Arthur L. Liman | Esq. | New York | 1-1-80 | 1-1-84 |
| Thomas S. Martin | Esq. | Washington, DC | 4-11-80 | |
| J. Vernon Patrick, Jr. | Esq. | Alabama | 5-15-78 | 6-1-82 |
| Paul C. Rogers | Esq. | District of Columbia | 1-4-79 | 1-1-83 |
| Maurice Rosenberg | Prof. | New York | 3-1-80 | |
| Charles E. Wiggins | Esq. | California | 1-4-79 | 1-1-83 |
| Arthur R. Miller Reporter | Prof. | Massachusetts | 11-1-78 | 11-1-82 |

## ADVISORY COMMITTEE ON CRIMINAL RULES

| | | | Date of Appointment | Date of Expiration |
|---|---|---|---|---|
| Walter E. Hoffman Chairman | SJ | Virginia (E) | 5-3-78 | |
| Wade H. McCree, Jr. | Prof. | Michigan | 7-1-71 | 10-1-82 |
| Roger Robb | | DC Circuit | 1-1-71 | 10-1-82 |
| Eugene A. Gordon | | North Carolina (M) | 6-16-76 | 10-1-82 |
| William L. Hungate | | Missouri (E) | 2-8-77 | 10-1-83 |
| Frederick B. Lacey | | New Jersey | 6-16-76 | 10-1-82 |
| Leland C. Nielsen | | California (S) | 7-1-71 | 10-1-82 |
| Russell E. Smith | SJ | Montana | 7-1-71 | 10-1-82 |
| D. Lowell Jensen | | AAG (Crim. Div.) | 5-28-81 | N/A |
| Richard A. Green | Esq. | Washington, D.C. | 6-16-76 | 10-1-82 |
| James F. Hewitt | | FPD California (N) | 10-1-76 | 10-1-83 |
| Leon Silverman | Esq. | New York | 10-1-76 | 10-1-83 |
| Fred M. Vinson, Jr. | Esq. | Washington, D.C. | 10-1-80 | 10-1-84 |
| Wayne LaFave, Reporter | Prof. | Illinois | 1-16-75 | 7-1-82 |

## COMMITTEE ON THE ADMINISTRATION OF THE BANKRUPTCY SYSTEM

| | | | Date of Appointment | Date of Expiration |
|---|---|---|---|---|
| Robert E. DeMascio, Chairman | | Michigan (E) | 10-1-79 | 3-1-84 |
| William E. Doyle | | 10 Circuit | 1-1-75 | 3-1-84 |
| Joel M. Flaum | | Illinois (N) | 7-1-79 | 3-1-84 |
| Robert R. Merhige, Jr. | | Virginia (E) | 3-13-75 | 3-1-84 |
| Charles R. Weiner | | Pennsylvania (E) | 1-1-77 | 3-1-84 |
| David W. Williams | | California (C) | 7-1-79 | 3-1-84 |
| James F. Gordon | SJ | Kentucky (W) | 1-1-75 | 3-1-84 |
| Lawrence Fisher | BJ | Illinois (N) | 3-1-80 | 3-1-84 |
| Richard W. Hill | BJ | New Jersey | 6-6-79 | 3-1-84 |
| Robert L. Hughes | bJ | California (N) | 6-6-79 | 3-1-84 |

## COMMITTEE ON THE OPERATION OF THE CRIMINAL LAW

| | | Date of Appointment | Date of Expiration |
|---|---|---|---|
| Alexander Harvey, II, Chairman | Maryland | 5-3-78 | |
| William J. Bauer | 7th Circuit | 6-15-76 | 1-1-82 |
| Paul Benson | North Dakota | 10-1-81 | 10-1-85 |
| Carl O. Bue | Texas (S) | 10-1-81 | 10-1-85 |
| Luther B. Eubanks | Oklahoma (W) | 10-1-81 | 10-1-85 |
| Robert M. McRae, Jr. | Tennessee (W) | 7-1-79 | 7-1-85 |
| William J. Nealon | Pennsylvania (M) | 1-1-79 | 1-1-85 |
| William C. O'Kelley | Georgia (N) | 7-1-79 | 7-1-82 |
| William H. Orrick | California (N) | 1-1-79 | 1-1-85 |
| Aubrey E. Robinson | District of Columbia | 1-1-77 | 1-1-83 |
| Robert J. Ward | New York (S) | 7-1-79 | 7-1-85 |

## COMMITTEE TO IMPLEMENT THE CRIMINAL JUSTICE ACT

| | | | Date of Appointment | Date of Expiration |
|---|---|---|---|---|
| Thomas J. MacBride, Chairman | SJ | California (E) | 10-1-79 | |
| Donald D. Alsop | | Minnesota | 7-1-79 | 7-1-85 |
| Edward J. Boyle | | Louisiana (E) | 7-1-79 | 7-1-85 |
| Gerard L. Goettel | | New York (S) | 10-1-81 | 10-1-85 |
| Samuel P. King | | Hawaii | 7-1-79 | 7-1-85 |
| Frank J. McGarr | | Illinois (N) | 10-1-81 | 10-1-85 |

## COMMITTEE ON THE ADMINISTRATION OF THE FEDERAL MAGISTRATES SYSTEM

| | | Date of Appointment | Date of Expiratio |
|---|---|---|---|
| Otto R. Skopil, Chairman | 9th Circuit | 10-1-80 | |
| Joseph W. Hatchett | 11th Circuit | 10-1-80 | 10-1-8( |
| Louis C. Bechtle | Pennsylvania (E) | 10-1-81 | 10-1-8 |
| Robert L. Carter | New York (S) | 10-1-80 | 10-1-8( |
| H. Dale Cook | Oklahoma (N, E, & W) | 3-1-80 | 3-1-86 |
| Garnett T. Eisele | Arkansas (E) | 5-15-78 | 6-1-84 |
| Herbert F. Murray | Maryland | 3-1-80 | 3-1-86 |
| James E. Noland | Indiana (S) | 11-6-73 | 3-1-82 |
| Morey L. Sear | Louisiana (E) | 10-1-81 | 10-1-8 |
| John Lewis Smith, Jr. | District of Columbia | 11-6-73 | 3-1-82 |
| Juan R. Torruella | Puerto Rico | 3-1-80 | 3-1-86 |
| Harry W. Wellford | Tennessee (W) | 1-1-77 | 1-1-83 |
| Paul J. Komives Mag. | Michigan (E) | 3-1-80 | 3-1-86 |

## COMMITTEE ON THE ADMINISTRATION OF THE FEDERAL PROBATION SYSTEM

| | | Date of Appointment | Date of Expiratior |
|---|---|---|---|
| Gerald B. Tjoflat, Chairman | 11th Circuit | 5-15-78 | |
| Myron H. Bright | 8th Circuit | 1-1-77 | 10-1-83 |
| Edward R. Becker | Pennsylvania (E) | 7-1-79 | 7-1-85 |
| Charles L. Brieant, Jr. | New York (S) | 10-1-81 | 10-1-85 |
| James M. Burns | Oregon | 5-15-78 | 6-1-84 |
| Charles H. Haden, II | West Virginia (N&S) | 7-1-79 | 7-1-85 |
| George N. Leighton | Illinois (N) | 10-1-81 | 10-1-85 |

## COMMITTEE ON THE OPERATION OF THE JURY SYSTEM

| | | Date of Appointment | Date of Expiratior |
|---|---|---|---|
| C. Clyde Atkins, Chairman | Florida (S) | 12-1-77 | |
| J. Waldo Ackerman | Illinois (C) | 10-1-81 | 10-1-85 |
| Howard C. Bratton | New Mexico | 1-1-79 | 1-1-85 |
| T. Emmet Clarie | Connecticut | 6-15-76 | 1-1-82 |
| William B. Enright | California (S) | 1-1-77 | 1-1-83 |
| John Feikens | Michigan (E) | 1-1-77 | 1-1-83 |
| Clifford S. Green | Pennsylvania (E) | 1-1-79 | 1-1-85 |
| June L. Green | District of Columbia | 7-1-79 | 7-1-85 |
| John A. MacKenzie | Virginia (E) | 1-1-77 | 1-1-83 |
| John F. Nangle | Missouri (E) | 10-1-81 | 10-1-85 |
| Charles Schwartz, Jr. | Louisiana (E) | 10-1-81 | 10-1-85 |
| Joseph L. Tauro | Massachusetts | 7-1-79 | 7-1-85 |

## AD HOC COMMITTEE ON JUDICIAL REVIEW PROVISIONS IN REGULATORY REFORM LEGISLATION

| | | | Date of Appointment |
|---|---|---|---|
| Robert A. Ainsworth, Jr. Chairman | | 5th Circuit | 5-19-81 |
| Richard S. Arnold | | 8th Circuit | 6-18-81 |
| Stephen Breyer | | 1st Circuit | 5-19-81 |
| Carl McGowan | SJ | DC Circuit | 5-19-81 |
| Otto Skopil, Jr. | | 9th Circuit | 5-19-81 |
| Elmo B. Hunter | SJ | Missouri (W) | 5-19-81 |
| Howard B. Turrentine | | California (S) | 6-18-81 |

## AD HOC COMMITTEE ON DISPOSITION OF COURT RECORDS

| | | Date of Appointment |
|---|---|---|
| Walter J. Cummings, Chairman | 7th Circuit | 7-21-81 |
| Robert L. Kunzig | Claims | 7-21-81 |
| Anthony A. Alaimo | Georgia (S) | 7-21-81 |
| Constance B. Motley | New York (S) | 7-21-81 |
| Spencer Williams | California (N) | 7-21-81 |

## IMPLEMENTATION COMMITTEE ON ADMISSION OF ATTORNEYS TO FEDERAL PRACTICE

| | | | Date of Appointment |
|---|---|---|---|
| James Lawrence King, Chairman | | Florida (S) | 11-1-79 |
| A. Leon Higginbotham | | 3rd Circuit | 11-1-79 |
| Edward J. Devitt | | Minnesota | 11-1-79 |
| Robert E. Keeton | | Massachusetts | 11-1-79 |
| Morris E. Lasker | | New York (S) | 11-1-79 |
| James R. Miller | | Maryland | 11-1-79 |
| William S. Sessions | | Texas (W) | 11-1-79 |
| Thomas E. Deacy, Jr. | Esq. | Missouri | 11-1-79 |
| Robert W. Meserve | Esq. | Massachusetts | 11-1-79 |
| Irving Younger | Prof. | New York | 10-1-80 |
| Cameron Bruce Littlejohn | Assoc. | Justice, Supreme Court of South Carolina | 10-20-80 |

## COMMITTEE ON PACIFIC TERRITORIES

| | | | Date of Appointment |
|---|---|---|---|
| Richard H. Chambers, Chairman | SJ | 9th Circuit | 7-1-76 |
| Anthony M. Kennedy | | 9th Circuit | 11-1-79 |
| Walter Ely | SJ | 9th Circuit | 7-1-76 |
| Leland C. Nielsen | | California (S) | 11-1-79 |
| Charles H. Habernigg | Esq. | Oregon | 7-1-76 |

# APPENDIX B

## BUDGET AUTHORITY FOR ALL AGENCIES, LEGISLATIVE BRANCH AND JUDICIAL BRANCH
(Millions of Dollars)

| Fiscal Year | GNP | | Federal Budget | | Federal Budget Ex. DOD | | Legislative Branch* | | Judiciary Budget** | | Judiciary as a Percent of | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | Amount | Growth Percent | Amount | Growth Percent | Amount | Growth Percent | Amount | Growth Percent | Amount | Growth Percent | GNP Percent | Federal Budget Percent | Federal Budget Ex. DOD Percent |
| 1940 | $ 100,000 | | $ 11,559 | | $ 9,689 | | $ 25 | | $ 11 | | .011 | .095 | .114 |
| 1945 | 212,300 | 112 | 68,390 | 492 | 10,771 | 11 | 50 | 100 | 14 | 27 | .007 | .020 | .130 |
| 1950 | 286,200 | 35 | 50,222 | -27 | 35,925 | 234 | 81 | 62 | 24 | 71 | .008 | .048 | .067 |
| 1955 | 399,300 | 40 | 57,076 | 14 | 26,289 | -27 | 106 | 31 | 32 | 33 | .008 | .056 | .122 |
| 1960 | 506,000 | 27 | 75,270 | 32 | 33,311 | 27 | 117 | 10 | 50 | 56 | .010 | .066 | .150 |
| 1965 | 688,100 | 36 | 138,610 | 84 | 85,410 | 156 | 171 | 46 | 76 | 52 | .011 | .055 | .089 |
| 1970 | 982,400 | 43 | 212,973 | 54 | 136,284 | 60 | 359 | 110 | 126 | 66 | .013 | .059 | .092 |
| 1975 | 1,528,800 | 56 | 412,099 | 93 | 326,099 | 139 | 754 | 110 | 250 | 98 | .016 | .061 | .077 |
| 1980 (est.) | 2,516,100 | 65 | 653,974 | 59 | 515,339 | 58 | 1,277 | 69 | 544 | 118 | .022 | .083 | .106 |

*Excludes Legislative Branch funds for rental of space of $13,000,000 in 1975 and $17,000,000 in fiscal year 1980 to make the data consistent with prior years.

**Excludes funds for rental of space of $62,500,000 in fiscal year 1975 and $80,000,000 in fiscal year 1980 to make the data consistent with prior years.

APPENDIX C

STATEMENT

OF

HONORABLE ELMO B. HUNTER
CHAIRMAN
COMMITTEE ON COURT ADMINISTRATION
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES

BEFORE THE

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE
ADMINISTRATION OF JUSTICE
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

WEDNESDAY
MAY 6, 1981

## INTRODUCTION

Mr. Chairman, I appear today in response to your request for an explanation of "the role which the Judicial Conference of the United States performs on behalf of the third branch and the extent to which the Administrative Office performs its responsibilities under direct supervision of the Conference." In your letter inviting me to testify you asked that I "explain to the subcommittee the Conference's duties and responsibilities and the extent to which the Conference's work is actually performed by staff in the Administrative Office."

While I have appeared before this panel on a number of occasions, I have never before felt quite as inadequate to the task as I feel today. The task assigned me deserves not a trial judge from Missouri -- but rather a blend of American historian, political science professor with a specialization in twentieth-century American government, and jurist pre-eminent in the field of jurisprudence.

Mr. Chairman, I am not *any* of those -- much less the required blend. Having clearly advised you of my reservations concerning this testimony, I will now proceed to do the best I can.

I believe the role of the Judicial Conference within the third branch and that organization's relationship with the Administrative Office are best explained and most easily understood in an historical context. Justice Holmes commented in a tax case[1] that: "Upon this point a page of history is worth a volume of logic." The role and relationship which I seek to explain today are certainly as historically influenced as are many tax decisions. Perhaps in this case a few pages of history will be of value. A great deal of the information which follows has been drawn from published research of the late Henry P. Chandler,[2] who served as the first Director of the Administrative Office for a period of seventeen years, from an extensive report to the Senate Appropriations Committee prepared in 1959 by staff member Paul J. Cotter,[3] and from a 1977 "Statement" by former Director of the Administrative Office, Rowland F. Kirks, prepared for this subcommittee.[4]

A BRIEF HISTORY OF THE U.S. COURTS
1789 - 1921

For the first 132 years of the nation's existence the overall administrative structure of the federal courts was a matter of little real concern to Congress -- or to judges who were serving a specific court; each court realistically administered its own affairs in its own fashion. Since World War I, however, changes in administration of the federal courts have been relatively dynamic, and directly related to the rapid growth of the federal judicial system and its workload.

When the Founding Fathers established the judicial branch they used rather broad concepts in the Constitution. With the Judiciary Act of 1789,[5] however, elements of detail began to appear. The nation was divided into thirteen "districts" with a court in each, and into three "circuits" with a court in each. Every one of the sixteen courts was a separate trial court of original jurisdiction; no provisions were made for either intermediate courts or for centralized administrative support. Given the size of the third branch, and the existing volume of business before it in 1789, Congress logically would not have then perceived a need for either. That simple decentralized structure set a pattern which remained unchanged for a century, and the tradition of decentralization still remains a strong influence today. Numbers of "districts" and "circuits" increased as the nation grew, yet intermediate courts of appeals as we now know them and centralized administrative support for the individual courts were never considered.

In 1891 -- for the first time -- Congress recognized and responded to the developing need for an intermediate appellate court system by enacting the Circuit Court of Appeals Act.[6] Even then, however, no action was taken to fashion instruments for centralizated administration. Twenty years later, when the Judicial Code of 1911[7] abolished the "circuit trial courts" first created in 1789, and established district courts as the basic trial units in the federal judicial system, the "three-tiered" structure which exists today was created. Yet again no provisions were made for nationwide coordination or centralized administration. The need for some degree of coordination had only recently been acknowledged. From that growing awareness in the first

decade of this century grew the institutions which are the subject of this oversight hearing.

## PRELIMINARY DEVELOPMENT OF A FEDERAL JUDICIAL ADMINISTRATIVE SYSTEM 1906 - 1939

### *Creation of the Judicial Conference*

In 1906 Roscoe Pound identified certain "causes of popular dissatisfaction" with the federal judicial system. As the nation had grown, increasing numbers of judgeships had been authorized, and the federal court structure had been modified in ways which were perceived to have contributed to a more complex structure. Additional factors -- an earlier "regulatory reform movement" and the development of new fields of law in commercial and industrial relations -- were creating new kinds of work for federal courts. The most obvious problem arising from the growth and increasing complexity in both work and structure was delay -- and for the first time a theme was heard -- one which we have heard repeatedly in the past decade: "The creation of more judgeships *alone* is not a remedy." Roscoe Pound recommended a spectrum of administrative changes in management of the federal courts, and his most controversial suggestion was a procedure to allow greater mobility in the use of judges -- a procedure flexible enough to permit the assignment of judges to locations in which the nature and volume of court business required their presence at a given moment in time.

A year later the American Bar Association created a special commission to study possible means to prevent delays in litigation and then-perceived "unnecessary costs" of litigation. That commission recommended a series of "administrative reforms."[8] Next, in 1913, the American Judicature Society was formed to study and promote modernization of the judicial system. Ex-President Taft was instrumental in the Society's formulation and a forceful advocate of administrative reform. His efforts immediately following termination of World War I were intensive and aggressive. Mr. Chandler's history capsulizes the cause for concern in the following brief summary:

> Statistical tables in the annual reports of the Attorney General show that beginning about 1918

> there had been a marked increase in the number of cases coming to the United States District Courts. The number filed of civil cases to which the United States was a party more than trebled between 1918 and 1921, rising from 2,877 to 9,722; the number of criminal prosecutions increased between 1917 and 1918 from 19,628 to 35,096, and went on to 54,487 in 1921; the number of suits filed to which the United States was not a party rose from 13,879 in 1918 to 22,453 in 1921.(9)

In 1921 Attorney General Daugherty appointed a committee of judges and U.S. Attorneys to identify problems and recommend remedies, and Congress convened hearings in 1921 and 1922. Ex-President Taft, by then Chief Justice Taft, personally testified in favor of administrative innovations, placing his prestige squarely behind proposals to provide the federal judiciary with a centralized policy-making, administrative and management entity. The result, in 1922, was Congressional creation of something labeled the "Conference of Senior Circuit Judges" -- the foundation upon which the Judicial Conference of the United States as we now know it was to be built.(10)

A brief review of the Congressional action in 1922 may be of value to this hearing -- because, just as we can see with hindsight now how little change actually occurred in federal court administration between 1789 and 1922, there were ideals and objections enunciated in Congress in 1922 which are today still enunciated. The principal sponsor of reform legislation in the Senate, Senator Albert B. Cummings of Iowa, opened debate on the proposed reform legislation in 1922 with the following words:

> When we contemplate a situation in which thousands and thousands of persons accused of crime must lie in jail for a year or two years, if they are unable to discharge themselves by giving bond, awaiting trial, and when we reflect upon the fact that in many parts of the United States it is utterly impossible to secure the trial of a civil suit within a year or two years, where both attorneys and parties are ready to proceed with the trial, it is to me a source of great humiliation.(11)

In addition to proposing twenty-five new judgeships to deal with the immediate crisis, the 1922 bill sought to remedy that "great humiliation" in a much more fundamental, if not radical, way. It called for the Chief Justice to annually preside over a "conference" of the most

senior judges of the circuits. This panel would serve as the principal policy-making body concerned with the administration of the United States courts, make a comprehensive annual survey of the condition of business in the courts, prepare plans for the transfer and reassignment of judges to areas of greatest need, and "submit such suggestions to the various courts as may seem in the interest of uniformity and expedition of business." The bill required the Attorney General to report to the conference on matters related to the business of the courts when requested to do so by the Chief Justice. It also provided that the senior district judge of each district court submit to the circuit's delegate to the conference a report setting forth the conditions in the district and recommendations for additional judicial assistance. The courts, through the creation of the conference, would acquire a policy-making body, with fact-finding capacity, and the authority to recommend to the Congress legislative proposals for change. In short, the bill was deliberately designed to provide a "corporate board of directors" for the federal judiciary.

The 1922 proposal was not, however, without its vocal critics. Influential Senator Thomas J. Walsh of Montana objected to the very idea of the Conference saying, "It means absolutely nothing on earth except a junket and a dinner." Senator Shields of Tennessee suggested that broadening the power to assign judges might be used in some way by influential figures to manipulate results in particular cases and noted that the lobbyist for the Anti-Saloon League was actively supporting the measure. Other commentators expressed the view that each judge should remain as unfettered as possible, seeing any "regulation" as an encroachment on the jealously-guarded independence of the federal bench.

One of the act's proponents, however, Senator Spencer of Missouri, provided a clear and apparently reassuring answer regarding the purpose of the Conference:

> The judicial business of the United States is largely administrative. There is a business side to it as well as the law side. There are practices in the different circuits which are commendable. There are some that could be improved. Both are remedied by [the] conference. It seems to me there is very great advantage

> when the circuit judges of the different circuits of the States get together once a year to discuss the method of transacting business, the state of their dockets, the things that have proved advantageous, the things that have proved disadvantageous. The resultant of it all is a distinct benefit to the administration of justice and that is precisely what the conference provides for.(12)

*The First Seventeen Years*

Conference sessions lasted from two to five days and were held in Washington, at the Supreme Court Building. The number of Conference members initially was ten, the senior circuit judges of the nine circuits and the Chief Justice. The 1922 statute did not explicitly make the Chief Justice a voting member of the Conference; it made him its "presiding officer." Chief Justice Taft, however, immediately established the precedent of voting membership and it has remained unquestioned since. The membership was expanded to eleven by the creation of the tenth circuit in 1929 and to twelve by the addition of the chief judge of the District of Columbia Circuit Court of Appeals in 1937. Conference minutes were prepared at the direction of the Chief Justice. A shorter account of the sessions was, from the earliest days, prepared by the Chief Justice for public distribution. This early practice is continued today in accordance with 28 U.S.C. §331, as amended, which now requires that the Chief Justice submit an annual report of the proceedings of the Conference to Congress. From the very beginning the Attorney General attended the Conference and delivered a report.

Mr. Chandler succinctly summarized the scope of early Conference proceedings:

> The Conference rightly took a broad view of its responsibilities. It gave earnest and persevering consideration to the problem of securing more informative judicial statistics. It tried to stimulate the courts to improve the methods of handling their calendars. It worked for better facilities for the courts and the requisite appropriations. It undertook to represent the courts in respect to legislation which would affect them.(13)

He also described early processes and procedures for the conduct of business:

> The number of members of the Conference, only one more at first than the membership of the Supreme Court, was not so large but what sitting around a table in committee of the whole, they could discuss intensively many items

> of their business. Nevertheless, at the first meeting, in order to focus their thought, Chief Justice Taft appointed five committees which reported the following year. It was thereafter in the early years, the customary but not invariable practice to appoint committees on particular subjects rather than standing committees. These generally reported in writing at the next meeting, putting in precise and appropriate form for adoption by the Conference, the consensus of opinion on matters which had come before it.(14)

The effects on court efficiency of the early Conference actions are difficult to assess meaningfully. One of the primary motives for the establishment of the Conference was, of course, the creation of a mechanism for the reassignment of judges from courts with available "judge time" to courts with an oppressive backlog. Even this area is difficult to assess. Records show that certain significant benefits were immediately realized. For example, in 1926 the district court for the Southern District of New York received 378 days of service from 12 or more district judges from other circuits. Yet the assignment of judges proved to be no panacea. Few courts could spare judges for more than a few days, and attorneys were reluctant in many instances to try a case before a judge unknown to them. Mindful of the potential for criticism inherent in reassignment on anything other than a random basis, Chief Justices Taft and Hughes were very careful to avoid abuses of the power of transfer. Certainly judges did not move about freely in the system. In the final analysis, the reassignment of judges turned out to be, in the words of Mr. Chandler, ". . . only an alleviating factor in congested districts, and not a very large one at that . . . ." While considerable improvement in the condition of court dockets was realized between 1922 and 1929 -- Assistant Attorney General William J. Donovan reported to the 1926 Conference that there had been a "general improvement in dockets due to increased efficiency of organization and of district judges" -- how much credit for that development can be attributed directly to the work of the Conference is not assessible; twenty-five new judgeships had been created by the same legislation which created the Conference.

Nevertheless, Conference efforts to improve efficiency during this period can be identified. One of these was a move to bring about

periodic "docket calls" in district courts to eliminate what a Conference resolution termed "dead and moribund cases." Guidelines were established for granting continuances, for examining prospective jurors with respect to their fitness, and for convening court for the hearing of motions and settlement of issues. Perhaps more important than any one of these initiatives by the Conference, however, was the explicit recognition of the duty of the courts to seek the expeditious resolution of cases rather than simply leaving their disposition to chance or to the wishes of counsel.

Also important -- as much for its symbolism as for any particular result -- was the recognition by the Conference of its admonitory function. As Director Chandler pointed out:

> Although under the statute the power of the Judicial Conference was only to make 'suggestions' to the courts in reference to their administration, it exercised its influence strongly under both Chief Justices Taft and Hughes to correct as far as it could, not only inefficient practices in general but neglect of duty in particular instances. This it did through advice to its members and assurances from the chief justices of readiness to give them moral support if needed.(15)

The Conference and Chief Justices Taft and Hughes encouraged senior circuit judges to act vigorously to prevent delays in their district courts. The Conference also recognized, however, that the principal factor determining the efficiency of any court is the innate capability of its judges and that the Conference's power to influence change was therefore realistically limited. Direct contact from the Chief Justice was used in only the most extreme cases of obdurate neglect, especially since lesser efforts usually proved effective.

Important as an influence on efficiency and policy formulation during the early years was the rather spontaneous movement toward judicial conferences within the circuits. These conferences -- neither required nor directly sanctioned by law at the time -- arose in response to the need for information-sharing and problem-solving meetings -- particularly between the district courts and their circuits -- but also between bench and bar. The federal bar was officially represented at many of these early conferences as the practice of holding annual sessions grew commonplace. These "circuit conferences" improved communications and produced

suggestions for further improvements which were forwarded to the Conference.

As we have learned only too well in the last two decades, as much as the efficiency of a court depends on the dedication and abilities of its judges, it also depends on the range and complexity of the laws which the courts must review. From its inception the Conference made recommendations for legislative change. Much of the business taken up at meetings of the Conference concerned the status of judicial work. Statistical reports were received from the Attorney General and from the individual circuits through their member judges. The superficiality and unreliability of the available data was a chronic problem for early Conferences, regardless of the medium through which the information was furnished. Chief Justice Hughes, for example, was candidly critical of the workload data -- whether transmitted by the Attorney General or by Conference members. Although substantial improvements were made over the decade of the Thirties in both the reporting of information and its preparation and assembly, the statistical data base available to the Conference remained a source of concern throughout that period.

Yet another area of Conference attention was what Mr. Chandler characterized as the "business needs" of the courts, such matters as quarters, supporting personnel, facilities and equipment. One of the first actions of the first Conference session in 1922 was to point out the need for supporting personnel, quarters and equipment for the judges who would soon be added as a result of the same 1922 legislation which created the Conference. The 1924 Conference focused Congressional attention on the inadequacy of certain court law libraries. As a result, $165,000 was appropriated the following year. The Conference and the Attorney General cooperated in developing a plan for the expenditure of these funds. The 1926 Conference report noted with satisfaction that:

> The result is that for the first time in many years the district judges find that they are fairly well supplied with their necessary tools, and the circuit courts of appeals have reasonably satisfactory libraries, or will have with the aid of further special items of legislation now in force. We have no doubt that the efficiency of the courts has been

substantially increased by the aid which this Congressional appropriation has given.(16)

In later years the Conference brought up such matters as the need for qualified legal secretaries, for funds for the incidental expenses of travel, the need for a greater number of law clerks, and for funds to more adequately staff the clerks' offices. All these matters received Congressional attention as a result of Conference efforts.

## CREATION OF THE ADMINISTRATIVE OFFICE AND EARLY DEVELOPMENT 1939 - 1960

While advances were made in such matters, a feeling persisted that the business needs of the judiciary would be more effectively met if presented to Congress by the third branch itself -- rather than filtered through the Department of Justice. The Thirties were lean and difficult years. Undoubtedly part of the dissatisfaction felt by judges was a result of the times rather than a consequence of the system of administration. Nonetheless, a disaffected feeling persisted, exacerbated by the fact that appropriated funds were provided jointly to the courts and the Department of Justice, raising a suspicion that the Department took care of its own needs and then gave the courts what was left. These concerns were discussed at Conference meetings. Despite repeated assurances from the Attorneys General and their aides, and evidence of a sincere effort to do equity with the limited funds available, dissatisfaction continued.

A distinct concern, but one which merged with the "business needs" problem in terms of the proposed solution, was the simple reality that the budget and expenditures of the courts remained *under the jurisdiction and control of* the executive branch. Though at that time fully seventy percent of the cases before the courts were government cases, the government's chief litigator and prosecutor directly controlled recommendations to the Bureau of the Budget concerning the salaries of judges, the number and salary levels of clerks and secretaries of judges, the accommodations and equipment in United States courthouses, and even the money available to judges to travel on official business. Judges who were not inclined to be critical of the past practices of the Attorneys

General were, along with others, increasingly aware of the potential for mischief in this procedure. Several Attorneys General had themselves pointed to this practice as both potentially threatening to the independence of the courts and a burden to the Department of Justice. In his annual report for fiscal year 1937, the Attorney General unequivocally indicated that he felt budgetary responsibility for the third branch should be located elsewhere:

> I believe, too, that there is something inherently illogical in the present system of having budget and expenditures of the courts and the individual judges under the jurisdiction of the Department of Justice. The courts should be an independent, coordinate branch of the Government in every proper sense of the term. Accordingly, I recommend legislation that would provide for the creation and maintenance of such an administrative system under the control and direction of the Supreme Court.(17)

His recommendation was incorporated in the ill-fated comprehensive court reform proposal of the Roosevelt Administration which generated so much controversy in 1937 over the feature which would have expanded the size of the Supreme Court. Though the 1937 bill died, its proposal for an administrative agency was received with considerable favorable comment. Two years later, in August of 1939, legislation creating the Administrative Office of the United States Courts was enacted.[18]

## ROLE OF THE ADMINISTRATIVE OFFICE

While I leave to Mr. Foley and Mr. Macklin the task of explaining the present *functions* performed by the Administrative Office -- a significant number of which have been mandated by Congress in the past two decades -- I will try to respond to your request that I explain "the extent to which the Administrative Office performs its responsibilities under direct supervision of the Conference" and assists the Conference in its work. Let me again reference a few historical factors. They have had a lasting impact and contribute to an understanding of the present-day relationships between the Conference and the Administrative Office.

The Administrative Office was clearly created to serve the Conference as a performance unit, implementing and executing Conference orders and policies; it was not intended to play a policy-formulation role of its

own. The 1939 legislation, in creating the position of Director of the Administrative Office, envisioned an *administrative* officer for the entire judicial system below the level of the Supreme Court, and the statute described the role of the Administrative Office largely by describing the duties of its Director. Appointment of the Director, and Deputy Director by the Supreme Court, with full recognition that they were to act under the supervision and direction of the Conference, was an unusual feature. Concern was apparently expressed when the 1939 statute was drafted that allowing the Conference -- which was not itself a court -- to appoint a Director might not comply with the Article II Constitutional requirement that judicially initiated appointments be made by "the courts of law." Providing that the Director be appointed by the Supreme Court overcame that potential problem. Each Chief Justice, as head of the Supreme Court and as Presiding Officer of the Judicial Conference, has consistently and effectively acted as the bridge between the appointing body and the supervisory body. All employees of the office below the Deputy Director were to be appointed by the Director.

The House committee which developed the bill summarized its findings in the committee report which accompanied the bill, and that statement still presents the clearest evidence of the intentions of those legislators who approved creation of the office. The committee report stated in part:

> The primary object of the bill is to promote the administration of justice in the U.S. courts. Its accomplishment is sought principally by the establishment of an administrative office, with a director in charge, having the duty of examining the dockets of various inferior Federal courts and preparing statistical data and reports of the business transacted by those courts, acting as a clearinghouse through which information gathered with reference to improving the efficiency of the courts and expediting the disposition of cases may be disseminated, preparing and submitting budget estimates of appropriations necessary for the maintenance and operation of the said courts and the Administrative Office, disbursing, as now provided by law, the moneys so appropriated for the maintenance andoperation of the courts, purchasing and distributing equipment and supplies, examining and auditing vouchers and accounts of the officials and employees of the courts, and performing such other functions as may be assigned by the Supreme Court and the Conference of Senior Circuit Judges, under whose supervision the Director and his assistant are to work.

> The design of the legislation is to furnish to the Federal courts the administrative machinery for self-improvement, through which those courts will be able to scrutinize their own work and develop efficiency and promptness in their administration of justice. To that end, the Director is required to prepare and submit quarterly, to the senior circuit judge of each circuit, statistical data and reports of the business transacted by the district court therein, and a semi-annual council of the circuit judges in each circuit is provided for the purpose of studying such reports and expediting the work of the district courts, as well as the circuit courts of appeals. The district judges are required to carry out the directions of the council as to the administration of the business in their respective courts. In addition to the council, the bill provides for an annual conference of the circuit and district judges in each judicial circuit, with participation by members of the bar for the purpose of considering the state of the business of the court and advising way and means of improving the administration of justice within each circuit.
>
> * * * * * *
>
> One further significant fact should be mentioned. Congress has created the inferior Federal courts and has the right to expect that they will function efficiently and expeditiously, but Congress thus far has failed to provide adequate administrative machinery whereby the best results may be obtained from the Federal judicial system. This bill is intended to supply that need. Experience has shown that the absence of administrative control which causes a delay of justice has amounted in many instances to its denial, and has occassioned bitter resentment among litigants. There are those who fear to litigate just causes in the Federal courts because of delays and resulting expense. On the other hand, prompt trial of cases would result in the elimination of causes brought only for the purpose of delay and harassment, because those cases are void of accomplishment when prompt trials are had.
>
> The bill places the responsibility for judicial administration where it belongs -- with the judiciary -- and it will be an urge to the elimination of the evil of judicial delays that the citizens of the country know that the courts have in their power the prompt and adequate dispostion of pending cases. (19)

The momentousness of the undertaking was well-recognized. One of the enactment's supporters, noted as the bill was debated on the House floor:

> The American people will pay gladly for the benefits made possible by this measure. There are many well-informed judges, lawyers, and laymen who believe that this bill, if enacted, will represent a landmark in the development of American jurisprudence. Personally, I share that belief. The American Judicature Society, in endorsing the bill, stated: 'We have no hesitation in declaring this measure to be the most important one ever drafted for the enforcement of either State or Federal judicature.' (20)

The "Administrative Office Act" achieved far more than creation of the office, it really provided the first *comprehensive* administrative

capability within the judiciary. Not only was the Administrative Office created, but -- perhaps just as significant -- the act also produced a more formal and comprehensive apparatus for policymaking within the third branch by the judges themselves. The 1939 enactment required -- for the first time -- that each "senior" -- or what we now call "chief" -- circuit judge convene a circuit council meeting twice a year, that a report of the Director of the Administrative Office be submitted to that circuit council, that the council take necessary action on the report, and that district judges promptly carry out the recommendations of the council. Thus, by 1939, just seventeen years after creation of the "conference of senior circuit judges," the administrative apparatus which we now have -- a Judicial Conference, circuit councils, and the Administrative Office -- had emerged, and the relationships between and among its components had been roughly outlined.

## LATER DEVELOPMENTS AND CURRENT RELATIONSHIPS

When title 28 was recodified in 1948 Congress changed the name of the Conference of Senior Circuit Judges to the Judicial Conference of the United States and *explicitly* recognized and authorized its role in recommending legislation relating to areas affecting judicial administration. Membership in the Conference was expanded in 1956 to include the chief judge of the Court of Claims. In 1957, membership was again expanded to include a district judge from each circuit, selected by the district judges of his circuit at the annual "judicial conference of the circuit." The chief judge of the Court of Customs and Patent Appeals was added in 1961.

Today the Conference consists of twenty-five members: The Chief Justice as presiding officer, the chief judges of the eleven courts of appeals of the judicial circuits, the chief judge of the Court of Claims, the chief judge of the Court of Customs and Patent Appeals, and eleven district court judges, each of whom is chosen by his district court colleagues within each judicial circuit to serve a three-year term. When the Fifth Circuit "splits", on October 1 of this year, an additional circuit and an additional district seat will be added for the new Eleventh Circuit. Under the provisions of

the Bankruptcy Reform Act of 1978 two new seats for bankruptcy judges will come into existence on April 1, 1984.

That incremental increase in membership, combined with a proliferation of business requiring Conference attention, long ago transformed the "single issue" committee arrangement instituted by Chief Justice Taft into a formal "standing committee" structure not unlike that used by both the House and the Senate, which is supplemented by "ad hoc" committees for particular projects. Both the present membership of the Conference and the present committee structure are presented in Appendix A to this statement. In summary that structure consists of eight "standing" or "general" committees, seven special committees, and the Committee on the Rules of Practice and Procedure. The jurisdictional responsibilities of the standing and special committees are clear from their names:

General Committees --

Committee on Court Administration

Committee on the Administration of the Criminal Law

Committee on the Operation of the Jury System

Committee on the Administration of the Bankruptcy System

Committee on the Administration of the Probation System

Committee on the Budget

Committee on Intercircuit Assignments

Committee on the Administration of the Federal Magistrates System

Special Committees --

Committee to Implement the Criminal Justice Act

Judicial Ethics Committee (Statutory)

Implementation Committee on Admission of Attorneys to Federal Practice

Committee on Pacific Territories

Bicentennial Committee

Advisory Committee on the Codes of Conduct

Committee on the Judicial Branch

In examining Appendix A, one feature worth noting is the fact that only the Court Administration Committee and the "Rules Committee" have individual sub units. In each case that arrangement is a necessary consequence of

their respective ranges of responsibility. I should also specifically note the existence of the Executive Committee; it exists for one purpose which has become increasingly more important in recent years -- it acts for the Conference when the Conference is not in session and expeditious action is required.

The proliferation of business long ago resulted in the Conference meeting *at least* biannually -- usually in March and September of each calendar year -- and occasionally scheduling "special sessions." Another consequence of growing work and the need for more expeditious Conference action on specific matters -- usually matters of urgent concern to Congress -- has been increasing reliance upon the Conference's Executive Committee's authority to act on behalf of the Conference when it is not in session.

In the past two decades Conference Proceedings agendas have become increasingly more complex. In order to cope with the increasing amount of work, semi-formalized procedures have become essential. Each Conference committee regularly schedules its meetings in order to prepare and distribute written reports to all Conference members prior to Conference meetings. Almost all of the work associated with the preparation and distribution of those reports is performed by Administrative Office personnel who routinely staff those Conference committees. Appendix B to this document graphically presents the organizational structure of the Administrative Office. The correlation between Conference committee jurisdiction and line divisions within the Office is obvious. Administrative Office personnel from the Magistrates Division staff the Conference's Committee on Administration of the Federal Magistrates System, Bankruptcy Division personnel staff the Committee on the Administration of the Bankruptcy System, and so forth.

In spite of the inevitably increasing complexity of the business before the Conference, and an undeniable growth in "bureaucratic procedures" associated with Conference committee activities, every effort has been made to preserve a maximum permissible degree of collegiality and agenda flexibility. In that sense, the creation of the Administrative Office and its increasing responsibility for supporting the Conference since 1939, have *complemented* rather than *complicated* the manner in which the Conference conducts its business. In my twelve years of work with the

Court Administration Committee I have repeatedly been amazed by the extent to which informality and an atmosphere of candid discussion have been preserved in spite of very heavy agendas and very sensitive policy issues.

One personal observation is very much in order here. Since my assumption of the chair on the Court Administration Committee in January of 1978, I have been required to testify on several rather sensitive legislative proposals before both houses. On March 7, 1980, I testified on a Senate bill (S. 2045, 96th Congress) which would have *statutorily* rigidified Judicial Conference processes and procedures for conducting business in furtherance of the objective of "greater public understanding and respect for" the judiciary. On behalf of the Conference, I advised the Senate that, while that objective -- that "end" -- was certainly desirable, the bill then pending was *not* going to achieve that end. That bill was merely mandating a *means* -- a rather elaborate and perhaps unconstitutional set of requirements -- which would drastically alter a time-proven, reliable, and highly desirable way of conducting Conference business. The issue is a very important one, especially given reintroduction of the bill as S. 111 in this Congress. For the record, I have included my Senate statement of March 7, 1980 as Appendix C to this document. My description (at pages 2-3 of that statement) of the procedure used by the Conference in developing views on the bill is an example of the care taken in such matters -- as well as the standard procedure followed by the Conference in conducting its business.

I will burden this presentation further concerning that issue only by observing that, if events since 1922 have supported any conclusion strongly, they have definitely evidenced the value of the Conference conducting its business in a collegial and candid atmosphere. Just eight weeks ago, during its March Proceedings, the Conference again reviewed the question of "opening" its meetings "to public observation". My committee had reviewed the issue with care and had unanimously concluded that the long-established practice of the judiciary "answering to" the public *through* the elected representatives in Congress was working better now than at any time in our history. Congress in recent years has demonstrated an increasing interest in working with the Judicial Conference in addressing problems which can only be resolved by Con-

gressional action. Your personal contribution to this development, Mr. Kastenmeier, has been critically important. The Conference has responded through programs such as the Brookings Institution's Seminars on the Administration of Justice in Williamsburg and by inviting Members of Congress and Congressional staff personnel to Conference committee meetings and to Conference Proceedings. Recently the Chief Justice formalized a tradition of inviting the Chairmen of both Judiciary Committees, or their representatives, to each Conference Proceeding. My committee strongly endorsed that approach. It works well. Never have our relations with Congress been more comfortable and constructive. The committee also recommended continuation of press briefings at the conclusion of each Conference session and the wide distribution of the *Reports of the Proceedings of the Judicial Conference*. The Conference accepted the committee's recommendations. We believe those methods of publicizing the Conference's work have proven their value over time -- helping rather than hindering the Conference's ability to perform its responsibilities efficiently -- properly balancing your "need to know" *on behalf of the public* and the Conference's need to preserve that collegial atmosphere which will permit a truly candid and productive exchange of opinions.

Realistically, as important as is the relationship between the Conference and Congress, the relationship you expressly asked me to address today -- that between the Conference and the Administrative Office -- is almost as important. Today I believe I can safely say that the relationship between the Administrative Office and the Judicial Conference is in complete conformity with that envisioned by Congress in 1939. Acting under the oversight of and in cooperation with Congress, the Conference *formulates* policy and exercises supervisory authority as a board of directors for the third branch; the Administrative Office *implements* Conference policy and performs ministerial duties and responsibilities under the Conference's supervision.

While a "look back at history" clearly reveals the continuity of a central spectrum of problems associated with the growth of the federal courts, their jurisdiction, and resulting litigation, I think it also reveals the value of both the Conference and the Administrative Office. When we look at the incredible increase in work facing our federal courts

since 1960 (see Appendix D), I dread the thought of where we would be today without both a Conference and an Administrative Office. If Congress had to directly oversee the functions which the Conference oversees, many would not be monitored; you simply do not have time. If the Conference did not have an Administrative Office, many policy determinations could never be implemented and -- if my experience is a measure -- many issues would be moot before becoming ripe for decision by the Conference if Administrative Office staff support for Conference committees did not exist. Our judges are racing to keep up with their adjudicatory duties. In the administrative area, they need the support provided by the Conference and the Administrative Office. Resources are stretched thin these days, and Mr. Foley will address that problem, but I believe the Administrative Office performs a broad spectrum of essential services without which the courts would never be able to remain in the race. The information base with which the Conference -- and Congress -- now works is vastly superior to any Chief Justice Hughes could have envisioned. Today the judiciary can and does respond to Congressional inquiries expeditiously and competently. Intercircuit assignments of judges are processed in accordance with established guidelines by an entity authorized to supervise their coordination so that the *entire* judicial system is well-served. Supporting personnel decisions are centrally managed and centrally administered. The Conference's authority to admonish and "discipline" -- just strengthened last year due to this subcommittee's commendable work on the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 -- is firmly established. As one Conference participant in the efforts which culminated in enactment of that law, I want to commend and thank you, Mr. Chairman, for the magnificent contribution your subcommittee and its staff made to that endeavor.

## CONCLUSION

Mr. Chairman, I hope this material has been responsive to your specific request for an explanation of the Conference's role and the relationship between the Conference and the Administrative Office. My treatment has been deliberately free of too many details -- and it has also only lightly touched upon one aspect of the role performed by both the Conference and

the Administrative Office. In the past four years I have appeared before this panel on a number of occasions. Other Conference committee chairmen increasingly appear before other Congressional subcommittees and full committees. In my twelve years with the Conference I have noted an amazing -- and encouragingly successful -- increase in communication and understanding. I would indeed be negligent were I to appear today without thanking this subcommittee and its staff for all that you have done to help us help ourselves for the past decade. I have been directly involved in the Conference's activities during that period. No other Member of Congress has more consistently and more responsively assisted the judiciary and encouraged it to perform its duties well than have you. On behalf of the Conference -- and every judge serving the federal judicial system -- I express our most genuine thanks.

FOOTNOTES

[1]New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921)

[2]Chandler, H.P., *Some Major Advances in the Federal Judicial System, 1922-1947*, 31 F.R.D. 307 (1963). *See also* Chandler, H.P., *The Administration of the Federal Courts*, _____ LAW & CONTEMP. PROB. 182 (1948).

[3]Cotter, P.J., Staff of Senate Comm. on Appropriations, 86th Cong., 1st Sess., FIELD STUDY OF THE OPERATIONS OF UNITED STATES COURTS (Comm. Print 1959).

[4]Hearings on General Oversight on Justice Related Agencies Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 96th Cong., 1st Sess. (1979).

[5]Act of Sept. 24, 1789, 1 Stat. 73.

[6]Act of March 3, 1891, 26 Stat. 826.

[7]Act of March 3, 1911, 36 Stat. 1087.

[8]See 29 ABA Report, at 395-417.

[9]Chandler, *supra*, note 2, 31 F.R.D. 307, at 319.

[10]Act of Sept. 14, 1922, 42 Stat. 837, *as amended* 28 U.S.C. §331 (1976).

[11]Chandler, *supra*, note 2, 31 F.R.D. 307, at 319.

[12]*Id.*, at 328.

[13]*Id.*, at 332.

[14]*Id.*, at 333.

[15]*Id.*, at 348.

[16]*Id.*, at 361

[17]*Id.*, at 375.

[18]Act of Aug. 7, 1939, 53 Stat. 1223, *as amended* 28 U.S.C. §631 *et. seq.* (1976).

[19]H. REP. No. 702, 76th Cong., 1st Sess. (1939).

[20]See 84 CONG. REC. 9308-10 (1939).

STATEMENT

OF

HONORABLE ROBERT H. BORK
UNITED STATES CIRCUIT JUDGE
FOR THE
DISTRICT OF COLUMBIA CIRCUIT COURT

ON BEHALF OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES

Mr. Chairman and Members of the Subcommittees, my name is Robert H. Bork. I have the honor -- albeit a temporary one -- of being the most recent appointee by President Reagan to the federal bench. I now sit as a circuit judge on the United States Court of Appeals for the District of Columbia Circuit. I previously practiced law, taught at the Yale Law School, and served as Solicitor General of the United States. It is with great pleasure that I join my colleague, Judge Elmo Hunter, in representing the views of the Judicial Conference of the United States.

This hearing is for the discussion of S. 1847 which would create an authorization process for appropriating federal funds for the judiciary and change the procedure by which federal judges get pay raises.

I will address the authorization aspects of S. 1847 and the goals this legislation is intended to achieve.

The bill as it stands is poorly drafted. The following list discusses some, but not all, of these problems.

1. The definition of "Federal judiciary" found in section 2 of the bill contains obvious errors.

First, the Court of Claims and the Court of Customs and Patent Appeals are not district courts covered by chapter 5 of title 28, United States Code. To the contrary, the Court of Claims is found in chapter 7 of title 28, United States Code, and the Court of Customs and Patent Appeals is found in chapter 9.

Second, on page 2, lines 2-3 an entity is referred to as "the Court of Customs". This court does not exist.

Third, two territorial courts (the Virgin Islands and Guam) are specifically mentioned as falling within the definition. At least one other (the Northern Mariana Islands) is not included.

Fourth, the Judicial Panel on Miltidistrict Litigation is not included in the definition; neither is the Temporary Emergency Court of Appeals.

Fifth, several temporary court employees such as jurors and commissioners are covered by the definition. However, others such as interpreters, masters, and witnesses are not. Also, apparently court reporters do not fall within the definition.

Sixth, several permanent court employees (e.g., magistrates and Federal public defenders) are included in the definition. Many others -- including circuit executives, clerks of court, bailiffs, secretaries, criers, and law clerks -- are not.

Seventh, the policy-making arm of the Federal judiciary -- the Judicial Conference of the United States -- is not included in the definition.

2. These errors in the "Federal judiciary" could create a two-track authorization and appropriation process under the provisions of section 3 of this bill.

3. What if one aspect of the authorization did not pass Congress? Could, for example, court interpreters and special masters operate without the district courts?

4. The bill in its title specifically excludes the Supreme Court from the process. Could the High Court operate without the lower courts? What would happen if the Supreme Court reversed and remanded a case to a court not authorized for a fiscal year?

5. Assuming that Congress failed to authorize the operation of the district courts, what would happen to constitutional guarantees such as the right to a speedy and public trial, or the right to trial by jury? Would all criminal indictments have to be quashed?

6. What if a defendant was midway through a trial when an authorization expired? Would double jeopardy have attached, and a dismissal mean that such defendant would go free, never to be tried again?

7. Could Congress exercise a "legislative veto" of a particular court decision by refusing to authorize the appropriation of funds for a given remedy?

I think answers to these important questions should be considered before this proposed legislation moves forward.

Let me turn to the purposes of S. 1847. Insofar as it is intended to replace the present system of using a congressional veto over presidential determinations, there can be little objection to it. Indeed, the court on which I now sit has recently placed the constitutionality of the present system of determining judges' salaries in doubt. Consumer Energy Council of America v. Federal Energy Regulatory Commission, No. 80-2184, slip op. (U.S. Ct. App. D.C. Cir., Jan. 29, 1982)

Some of the other testimony I have seen, however, suggests that an additional purpose on the part of some supporters may be to discipline the judiciary for making unpopular decisions. Let me make it clear that I am not one of those who think it improper for the political branches of government to respond to judicial decisions that are unwarranted by the law. I also think, as I made clear while a professor of law, that there are a number of such decisions and that the judiciary ought to be encouraged to stay within a proper and more limited role. I think it would be entirely proper, even salutory, for Congress to consider how that might be done.

Refusing to raise judicial salaries because of dislike,

even justified dislike, of particular decisions is not an appropriate mechanism of control. It is, for one thing, wholly ineffective. The Supreme Court of the United States is not going to overrule Roe v. Wade in order to get a salary increase. That decision may be overruled but not for that reason. Penalizing the entire judiciary by continuing to allow their compensation to be reduced by inflation because of dissatisfaction with particular decisions would not only be mean-spirited but would be wholly ineffective. Indeed, its only result would be to deter more and more good lawyers from accepting judgeships. The suggestion that many are not now deterred by the enormous income loss involved is preposterous to anyone who has talked, as I have, to many practicing lawyers about this subject.

Another purpose of this bill is said to be an increase in legislative oversight of the judicial branch. Legislative oversight is entirely proper, but tying oversight to the budget process runs the danger of either delaying authorizations and appropriations with serious adverse consequences to the system of justice or to avoid that problem, a diminution in the amount and quality of the oversight provided.

I want to suggest, in closing, that oversight and congressional action are badly needed on the topic of federal court jurisdiction. As matters now stand, the constant increase in the number and complexity of cases filed in federal courts absolutely requires that new judgeships be created. But that is not a long-term solution. Productivity declines as numbers of judges per court are increased. More important, the nature of courts and law is transformed, in highly unfortunate ways. I will not take the time to provide detail today, but I would like to refer the Subcommittee to a Report of the Department of Justice Committee on Revision of the Federal Judicial System entitled "The Needs of the Federal Courts." To put it briefly, we currently have no alternative to continuously enlarging the size of the federal judiciary. That process is altering the nature of the federal judicial branch

in a very adverse way. The only available solution is a restriction in federal court jurisdiction. In my opinion, the solution is the total elimination of diversity jurisdiction, a reversal of the process of making more and more actions federal offenses, and the creation of a set of Article I tribunals to handle the enormous flood of simple, repetitive factual determinations which unnecessarily clog the Article III courts. If these things are not done, many of the virtues of the federal judiciary will be destroyed. If they are done, the number of judgeships required would actually be fewer than we now have. This is the most important topic relating to the federal judiciary which Congress can address.

Note.--The report entitled "The Needs of the Federal Courts", referred to above, follows.

APPENDIX

---

# THE NEEDS OF THE FEDERAL COURTS

**Report of the**
**Department of Justice Committee**
**on**
**Revision of the Federal Judicial System**

**JANUARY 1977.**

## PREFACE

In his address to the Sixth Circuit Judicial Conference on July 13, 1975, President Gerald R. Ford expressed his deep concern about the problems confronting the federal judicial system. At the President's direction, Attorney General Edward H. Levi appointed within the Department of Justice a Committee on Revision of the Federal Judicial System. With Solicitor General Robert H. Bork serving as Chairman, the Committee conducted numerous studies and discussed various proposals through June 1976, at which time this Report was prepared. Since then some of the Committee's proposals have been modified to take account of recently-enacted laws and other developments. These changes are reflected in the recommendations offered in the Report.

# REPORT ON THE NEEDS OF THE FEDERAL COURTS

## Introduction

Our federal courts have served us so well for so long that we have come to take their excellence for granted. We can no longer afford to do so. The federal court system and the administration of justice in this nation need our attention and our assistance. Law and respect for law are essential to a free and democratic society. Yet without a strong and independent federal judicial system we can maintain neither the rule of law nor respect for it.

The central functions of the federal courts established under Article III of the Constitution of the United States are to protect the individual liberties and freedoms of every citizen of the nation, to give definitive interpretations to federal laws, and to ensure the continuing vitality of democratic processes of government. These are functions indispensable to the welfare of this nation and no institution of government other than the federal courts can perform them as well.

The federal courts, however, now face a crisis of overload, a crisis so serious that it threatens the capacity of the federal system to function as it should. This is not a crisis for the courts alone. It is a crisis for litigants who seek justice, for claims of human rights, for the rule of law, and it is therefore a crisis for the nation.

In this century, and more particularly in the last decade or two, the amount of litigation we have pressed upon our federal courts has skyrocketed. In the fifteen year period between 1960 and 1975 alone, the number of cases filed in the federal district courts has nearly doubled, the number taken to the federal courts of appeals has quadrupled, and the number filed in the Supreme Court has

doubled. Much of this litigation is more complicated because of the rising complexity of federal regulation.

Despite this rising overload, we are asking the judges of the federal courts to perform their duties as effectively as their predecessors with essentially the same structure and essentially the same tools. They are performing wonders in coping with the rising torrent of litigation, but we cannot expect them to do so forever without assistance. This Report sets forth proposals for legislation that will enable our federal courts, now and in the future, to continue to carry out their essential mission.

## I. The Threat of Rising Workload

Overloaded courts are not satisfactory from anyone's point of view. For litigants they mean long delays in obtaining a final decision and additional expense as court procedures become more complex in the effort to handle the rush of business. We observe the paradox of courts working furiously and litigants waiting endlessly. Meanwhile, the quality of justice must necessarily suffer. Overloaded courts, seeking to deliver justice on time insofar as they can, necessarily begin to adjust their processes, sometimes in ways that threaten the integrity of the law and of the decisional process.

District courts have delegated more and more of their tasks to magistrates, who handled more than one-quarter of a million matters in fiscal 1975 alone. Time for oral argument is steadily cut back and is now frequently so compressed in the courts of appeals that most of its enormous value is lost. Some courts of appeals have felt compelled to eliminate oral arguments altogether in many classes of cases. Thirty percent or more of all cases are now decided by these courts without any opportunity for the litigant's counsel to present his case orally. More disturbing still, the practice of delivering written opinions is declining. About one-third of all courts of appeals' decisions are now delivered without opinion or explanation of the results. See, *e.g.*, 538 F. 2d 307-348 (1976).

These are not technical matters of concern only to lawyers and judges. They are matters and processes that go to the heart of the rule of law. The American legal tradition has insisted upon practices such as oral argument and written opinions for very good reason. Judges, who must be independent and are properly not subject to any other discipline, are required by our tradition to confront the claims and the arguments of the litigants. They

must demonstrate to the public that they are not acting out of whim, caprice, or mere personal preference. Our tradition requires that judges explain their decisions and thereby demonstrate to the public that those decisions are supported by law and reason. Continued erosion of traditional practices could cause a corresponding erosion of the integrity of the law and of the public's confidence in the law.

These problems are only a few of the most visible symptoms of the damage that is being done to our federal court system by having more and more cases thrust upon it. There are others. Courts are forced to add more clerks, more administrative personnel, to move cases faster and faster. They are losing time for conference on cases, time for reflection, time for the deliberate maturation of principles. We are, therefore, creating a workload that is even now changing the very nature of courts, threatening to convert them from deliberative institutions to processing institutions, from a judiciary to a bureaucracy. This development, dangerous to every citizen in our democracy, must be arrested and reversed. And it must be done in ways that will preserve the quality of justice in our federal courts.

The solutions proposed in this Report are broad in concept and in effect. Remedies of smaller scope, remedies that tinker here and there for the sake of minor and temporary relief, are simply not adequate to meet a problem of broad scale. Caseloads will continue to increase dramatically according to almost all predictions. The solutions offered, therefore, are designed not only to afford immediate relief to the courts and the public but to provide for the future. Their adoption should at once preserve our federal courts for their central task of guarding human rights and democratic government while improving the quality of justice, as well as cutting the time and cost of securing it, for every person who goes to federal court.

## II. Remedial Measures

To cope with the crisis of volume, three basic approaches are recommended. First, we must enlarge the resources of the federal courts to handle the caseload—by adding judges and creating new tribunals. Second, we must lighten the load of work that falls upon the courts by reducing the categories of matters they must entertain and decide. With regard to the Supreme Court, this requires rescinding their obligatory jurisdiction in certain types of appeals. With respect to the district courts, it involves the elimination of diversity jurisdiction; it also requires that litigants exhaust alternative avenues of relief before bringing certain cases into the federal courts. Third, we must adopt measures to enhance the effectiveness and the efficiency of the system. This includes improving the way we select judges and creating a capability in the system to anticipate and deal with new developments in federal law that are likely to have serious impact upon the volume or nature of the federal courts' work.

### A. *Enlarging the Capacity of the Federal Judicial System*

#### 1. *Additional judges, better selected*

One response to the problem of overload is the appointment of more federal judges. Bills creating more judgeships for our district courts and courts of appeals (S. 286, 287) have been pending in Congress for several years. Provisions for more judgeships should be enacted without further delay.

The quality of federal justice depends on the quality of federal judges. There are currently 596 judgeships in the various federal court systems under Article III of the Constitution, including the Supreme Court, the Circuit Courts of Appeals, the District Courts, the Court of Claims, the Court of Customs and Patent Appeals,

and the Customs Court. Although the quality of the federal bench is in fact high and perceived to be high, few would deny that there is room for improvement on both the trial and appellate levels. Our efforts must be to assure excellence in judicial appointments.

The Constitution provides that federal judges are to be appointed by the President, "by and with the advice and consent of the Senate." In fact, however, there has developed over the years a system of judicial selection that has come to be known as "Senatorial courtesy." This term refers to a veiled selection process that is heavily political and grounded in outdated notions of senatorial patronage. This practice is consistent with neither the interests of the American public nor the needs of the federal judicial system.

For the purpose of reassessing the current selection procedures, the Committee recommends creation of a Commission on the Judicial Appointment Process. This group should include representatives of diverse segments of the legal community and the public at large. It should recommend: (1) standards to be utilized in the selection of candidates for judicial appointment; (2) useful roles for the various individuals and institutions concerned with the selection of federal judicial candidates; and (3) procedures and structures to attract and retain highly qualified judicial personnel.

Although it is clearly essential today that Congress increase the number of judges to cope with the rising tide of litigation, and that they be judges of high quality, such an approach does not promise a long-term solution. Swelling the size of the federal judiciary indefinitely would damage collegiality, an essential element in the collective evolution of sound legal principles, and diminish the possibility of personal interaction throughout the judiciary. These developments would be harmful

to the quality of judicial decision and would also increase the likelihood of conflicting decisions between district courts and between the courts of appeals for the various circuits. That would lessen public confidence in the courts, create confusion about legal rules, and increase the amount of litigation and its cost to the public.

Moreover, a powerful judiciary, as Justice Felix Frankfurter once observed, is necessarily a small judiciary. That is so for several reasons. Large numbers dilute the great prestige that properly attaches to a career on the federal bench and, given the low compensation that we provide for federal judges, that dilution will make it increasingly more difficult to attract first-rate men and women. We will never pay the incomes to judges that they could earn in other pursuits and we must not create conditions that require us to settle for second best in the federal courts.

Over the long run, therefore, we need more than additional judgeships. We cannot go on expanding the size of the federal judiciary indefinitely. We must also reexamine the responsibilities with which our courts are charged to ensure that this precious and finite resource can continue to function in the best interests of all our citizens.

2. *Non-Article III Tribunals*

The proposal with the most significance for the future of our federal court system is the creation of new tribunals to shoulder the enormous and growing burden of deciding the mass of technical or repetitious factual issues generated by federal regulatory and welfare programs.

Few changes in our government during the past 50 years have been so remarkable as the growth of federal welfare and regulatory programs. Federal legislation now addresses our most basic needs: air, water, fuel, electric power, medicines, food, education, and safety. Special federal

programs provide assistance for the poor, the jobless, the disabled, and other needy citizens. These crucial matters deserve special attention. Yet this vast network of federal law has been entrusted, in large part, to a judicial system little changed in structure since 1891. Review of agency action, and lawsuits arising directly under federal statutes, now constitute as much as one-fifth of the business of the federal courts, and litigation under new legislation will make the effect even more substantial. For example, the Mine Safety Act potentially could generate more than 20,000 full jury trials each year in the district courts, a burden that would overwhelm the courts and defeat rights the new legislative programs are designed to extend.

There is no immediate prospect that this process of adding new federal programs will end. Whatever we may think of that trend, we should at a minimum take care that we do not swamp the federal courts and with them the needs of the litigants. It can only be disheartening for a litigant whose claim requires no more than a thoughtful and disinterested factfinder to be forced into competition with all other civil and criminal business for the precious time of an Article III judge. Although Article III courts are uniquely qualified to protect individual freedoms, interpret federal laws, and preserve democratic processes of government—the indispensable functions of the federal courts—they are not unique in their ability to adjudicate relatively unsophisticated, repetitious factual issues. Many other kinds of tribunals perform that function as accurately and as well.

The Committee, therefore, proposes creation of a new system of tribunals that can handle claims under many federal welfare and regulatory programs as capably as the Article III courts and with greater speed and lower cost to litigants. The shifting of these cases to the new tribunals will also preserve the capacity of the

Article III courts to respond, as they have throughout our history, to the claims of human freedom and dignity.

The cases that should be transferred to new tribunals are those that involve repetitious factual disputes and rarely give rise to important legal questions. Among these are, for example, claims arising under the Social Security Act, the Federal Employers Liability Act, the Consumer Products Safety Act, and the Truth-in-Lending Act. These matters have great individual and social significance but the questions they raise could be handled as effectively and justly by trained administrative judges as by Article III judges burdened with the pressing business of a general criminal and civil jurisdiction.

None of the special competence of our present Article III courts would be lost to litigants in these new tribunals. If a substantial question of constitutional or statutory interpretation arose in the administrative system, that question could be referred to the appropriate Article III court for decision. Review of that legal determination could be sought by petition for certiorari in the Supreme Court. Litigants would retain every important right they now possess and would gain much in savings of time and money.

New administrative tribunals also could provide much needed flexibility. For example, an administrative court system could consist of an Article I trial division, in which all cases would be filed in the first instance, and an administrative court of appeals. The trial division could serve the function now served by administrative law judges in many cases, thereby compressing and expediting internal agency review. Procedures before the trial court would vary with the complexity of the case and the needs of the parties. Many cases could be handled informally and without counsel unless the claimant desired one, giving some of the advantages of

small claims courts. Other cases, involving technical matters, might require rigorous procedural and evidentiary rules, but could be more easily handled with the assistance of a permanent expert staff.

These proposals avoid a major pitfall of comparable proposals, for the administrative court would not be specialized by a single subject matter. The administrative judge would be able to maintain a broad perspective while developing increased familiarity and expertise in dealing with administrative cases. In addition, the caseload would be sufficiently general to attract judges of high caliber.

Specialized courts and boards already play an important role in our governmental system. The Tax Court, for example, has provided a useful alternative to suits in federal district courts. The Armed Services Board of Contract Appeals and other similar boards resolve the great majority of contract disputes involving the government. The Board of Immigration Appeals provides valuable service in the specialized matters within its jurisdiction. And administrative tribunals have long been accepted in foreign countries such as Belgium, Italy, and France. These tribunals may serve as useful models for creation of a system of administrative courts.

The gains for Article III courts would be substantial. Implementing this proposal now would relieve them each year of more than 20,000 cases, perhaps more than 30,000 cases. Avoiding a growing and ultimately crushing burden in the future is even more important. It is essential that litigation under future federal programs be directed to the tribunal in which it can be handled most effectively. For too long, Congress has ignored the effect of new federal programs on our overworked judicial system.

Although this proposal is simple in concept, implementing it will, of course, require much experimentation. For that reason, the Committee suggests that the proposal be referred to the Council on Federal Courts (proposed later in this Report) for development of additional details. The plan might then be implemented in stages, beginning with a pilot study conducted by assigning to these new tribunals a few categories of cases, such as Social Security disability claims and Mine Safety Act disputes, in a limited number of federal districts. The pilot effort could be reviewed carefully, both to ensure that no injustices occurred and to find the best procedures. The system of new tribunals should then be gradually expanded, both by subject matter and geographically, until it has attained its full potential.

B. *Reducing the Burdens on the Federal Judicial System*

Other measures must also be taken to curtail the flow of cases into the court system, or into particular courts where the pressures of excessive volume are most acute. The jurisdiction of the federal courts has been revised several times in the past, always with beneficial results. It is now necessary again. Approaches must vary, of course, depending on whether they relate to the jurisdiction of the Supreme Court, the courts of appeals or the district courts.

1. *Supreme Court: Elimination of Mandatory Appellate Jurisdiction*

The business of the Supreme Court, like that of the other federal courts, has expanded significantly in recent years. After growing steadily for three decades, the number of filings in the Supreme Court began to accelerate ten years ago, increasing from 2,744 cases in the 1965 Term to 4,186 in 1974. Fortunately, Congress has given the

Court discretionary (or *certiorari*) jurisdiction over much of its docket, enabling the Court to hold nearly constant the number of cases (150 to 160) it decides on the merits after oral argument. These are the cases that necessarily consume the bulk of the Justices' time. Nevertheless, despite the broad scope of its discretionary jurisdiction, the Supreme Court is needlessly burdened by appeals the Court has no power to decline. The Committee therefore recommends that the remaining mandatory appellate jurisdiction of the Supreme Court be abolished.

During the past several years Congress has taken significant steps to reduce the burden of the Supreme Court's mandatory docket, most notably by eliminating in large part the cases heard by three-judge district courts and appealed directly to the Supreme Court. The Court is still required, however, to consider on the merits cases from the state court systems in which a federal law has been invalidated or a state law upheld in the face of a federal constitutional attack. In addition, the Court must consider on the merits appeals from federal courts of appeals and, more significantly, from district courts when a federal statute has been held to be invalid.

Obligatory Supreme Court review of appeals from state courts and federal courts of appeals should be eliminated, as the Federal Judicial Center's Study Group on the Caseload of the Supreme Court concluded four years ago. While these cases have typically accounted for only a small percentage of the Supreme Court's business, the number of cases appealed from the federal district courts and courts of appeals will increase as a result of the virtual elimination of three-judge district courts. The Committee believes there is no reason why they should be subject to special treatment.

Nor is there sufficient reason to require the Supreme Court to review on the merits all cases in which the highest court of a state invalidates a federal law or upholds a state statute in the face of a federal constitutional attack. Mandatory Supreme Court review in these circumstances implies that we cannot rely on state courts to reach the proper result in such cases. This residue of implicit distrust has no place in our federal system. State judges, like federal judges, are charged with upholding the federal constitution. Indeed, the Supreme Court itself now summarily disposes of nearly all these state cases, deciding them without briefing or argument. In effect, the Supreme Court is exercising discretionary jurisdiction although the statute makes review mandatory. It is time to conform the law to the reality.

Congress should, therefore, eliminate those sections of the United States Code imposing mandatory review jurisdiction and make the certiorari practice applicable throughout the Supreme Court's jurisdiction. There is no reason to presume that issues raised on appeal are more important than issues raised on certiorari. We now trust the Supreme Court to decide important issues; we should trust it to decide which cases are most in need of review.

2. *Relief for the Courts of Appeals and District Courts*

In order to provide essential relief to the lower federal courts, (1) diversity jurisdiction should be abolished and (2) state prisoners should be required to exhaust their state remedies before starting a federal suit to attack prison conditions.

a. *Elimination of Diversity Jurisdiction*

Claims under state law are the basis of the vast majority of lawsuits in this country. When the litigants are residents of the same state, these cases are decided in state



91-266 O - 82 - 7

tribunals, and no one objects to that. However, when the litigants are citizens of different states, such suits have long been allowed to enter the federal courts, even though they involve only questions of state law. These diversity cases account for a large part of the federal district courts' caseload.

More than 30,000 diversity cases were filed in the district courts during fiscal 1975, constituting almost one-fifth of the total filings. During the same year, diversity cases accounted for more than 25 percent of all jury trials and, notably, 68 percent of all civil jury trials. Appeals from diversity cases constitute slightly more than 10 percent of the filings in the courts of appeals.

The burden diversity jurisdiction imposes on the federal courts can no longer be justified. State courts, not federal courts, should administer and interpret state law in all such cases. Federal judges have no special expertise in such matters, and the effort diverts them from tasks only federal courts can handle or tasks they can handle significantly better than the state courts. Federal courts are particularly disadvantaged when decision is required on a point of state law not yet settled by the state courts. The possibilities both of error and of friction between state and federal tribunals are obvious.

The modern benefits of diversity jurisdiction are hard to discern. The historic argument for diversity jurisdiction—the potential bias of state courts or legislatures—derives from a time when transportation and communication did not effectively bind the nation together and the forces of regional feeling were far stronger. As the Chief Justice has remarked, "[c]ontinuance of diversity jurisdiction is a classic example of continuing a rule of law when the reasons for it have disappeared." Other Justices of the Supreme Court, as well as prominent legal scholars and practitioners, agree. Diversity cases involving less than

$10,000 have been left to the States for many years without noticeable difficulty. The additional burden on the state courts would be small since the cases would be distributed among the fifty state systems. What is needed therefore is full elimination of diversity jurisdiction.

b. *Requiring Exhaustion of State Remedies in Prisoner Civil Rights Act Cases*

Prisoner cases now constitute a significant part of the district courts' work. In fiscal 1975, prisoners filed 19,307 petitions, approximately 16 percent of the new civil filings. Of these, about 11,000 were *habeas corpus* petitions or motions to vacate sentence. The remainder consisted primarily of civil rights actions, which normally attack the deficiencies of prison conditions.

Most civil rights actions of this type are filed by state prisoners. The 6,000 filings by state prisoners are more than triple the number filed five years ago and 27 times the number filed in 1966. Only a small percentage go as far as an actual trial, but the burden on the federal courts from these cases is significant and it appears to be growing.

H.R. 12008, introduced on February 19, 1976, authorizes the Attorney General of the United States to institute suits on behalf of state prisoners, after notice to prison officials, and to intervene in suits brought by private parties upon a certification by the Attorney General "that the case is of general importance." The bill also provides that "[r]elief shall not be granted" in individual actions under 42 U.S.C. 1983 unless it appears that the individual has exhausted such plain, speedy, and efficient State administrative remedy as is available. An exception is made when "circumstances [render] such administrative remedy ineffective to protect his rights."

When prisoner complaints are based on allegations of system-wide problems, representation by the Attorney General should correct the situation. Exhaustion of state administrative remedies would eliminate from the federal courts at least the cases decided favorably to the prisoner. Unsuccessful litigants might continue to press their claims in federal courts, but the court should have the benefit of a more complete record and more focused issues. The bill will also encourage the states to develop more responsive grievance procedures. It is the responsibility of the states to provide adequate penal facilities and treatment for state prisoners and, in the initial stages, the administrative process is better suited than a federal court to handle typical prisoner complaints. New procedures instituted by the Federal Bureau of Prisons seem to be supplying a useful grievance mechanism for federal prisoners and reducing the number of federal suits.

C. *A Planning Capability for the Federal Judicial System*

The work of the federal courts will continue to change rapidly and substantially. If we are to act responsibly, we must anticipate new problems and develop solutions before the difficulties confronting the courts reach an advanced stage.

To satisfy the immense demands on them, the federal courts need the very best structure and the most effective procedures the nation can provide. They must be able to respond as soon as trends in the volume and nature of the courts' work can be identified. To have this, the courts will need a permanent agency that has the responsibility for making proposals to the Congress and to the Judicial Conference of the United States.

The concept of creating a planning capability for the third branch of government is not novel. Six years ago Chief Justice Burger urged consideration of the idea of forming a Judiciary Council of six members, comprised

of two appointees of each of the three branches of Government. The Council would report to the Congress, the President and the Judicial Conference on the wide spectrum of developments that affect the work of the federal courts.

A slightly different version of the proposal was advanced in 1975 by the Commission on Revision of the Federal Court Appellate System, which supported creating a standing body to study and make recommendations regarding the problems of the federal courts.

Whatever its form, an agency is needed to project trends, foresee needs and propose remedial measures for consideration by the profession, the administration, the Congress and judicial groups. The judicial planning agency could draw on work done by Committees on the Judiciary of both Houses, the Federal Judicial Center, the Judicial Conference of the United States, the Department of Justice and private groups. The role of systematically auditing the functions of the federal courts must be an ongoing effort that permits the members of a permanent panel to develop deep, expert knowledge and a sure feel for what the courts need today and are likely to need tomorrow. This is not now being done in any coordinated or coherent way.

The Committee therefore recommends creation of a Council on Federal Courts.

### III. The National Court of Appeals

After extensive study and hearings the Commission on Revision of the Federal Court Appellate System proposed in 1975 creation of a National Court of Appeals, a new seven-member tribunal, standing between the present regional Courts of Appeals and the Supreme Court. The Commission viewed the purpose of the tribunal as filling the need to resolve conflicts in rulings among the courts

of appeals on issues of national law and to enlarge the capacity of the federal judicial system to make definitive declarations in significant cases of national law, whether or not intercircuit conflicts were involved. It was not a goal of the proposal—which is now under review by a Senate subcommittee in the form of two bills (S. 2762, S. 3423)—to provide relief for the very heavy workload of the Supreme Court. Under the current version of the plan the National Court of Appeals would get its docket from the cases referred to it by the Supreme Court, with the possibility of ultimate return to that Court.

While recognizing the thought and effort behind the Commission report, the Committee opposes creation of a new National Court of Appeals at this time.

Adding a National Court of Appeals almost surely would increase the already heavy burden on the Supreme Court. The Justices, experienced at simply accepting or declining to accept cases for review, would have to decide in addition whether cases should be reviewed initially by the Supreme Court or referred to the National Court of Appeals. That determination would require considerable study to identify the pivotal issues of cases and to understand their ramifications. There would, inevitably, be disagreements about which of three choices, rather than the present two, was best. The problems inherent in that process are considerable. The quite natural effect of expanding the options will be to increase the complexity of the choice and thereby increase the time needed for these threshold determinations, which the Supreme Court is now able to make rapidly. The large growth in Supreme Court filings would then become substantially more of a burden than it now is.

Moreover, each decision on the merits by the National Court of Appeals would have to be scrutinized very carefully by the Supreme Court to ensure that an issue had not been finally resolved, or even dicta pronounced, in a manner contrary to its own views. An erroneous decision by a National Court of Appeals obviously carries far graver consequences than a similar decision by one of the present courts of appeals. The necessity of granting plenary review of a decision of the National Court might arise frequently, particularly if the judicial philosophies of the two benches should differ to any significant degree. That would impose upon many litigants four separate stages of federal adjudication with the expense and delay we all want to avoid, and a still further increase in the burden upon the Supreme Court.

In light of these dangers and others, a new National Court should be created only if the current need is clear and compelling. It is not. Rather than giving relief to the Supreme Court, or the other existing courts of appeals, the National Court of Appeals is aimed at increasing national appellate capacity in order to decide cases that involve conflicts in the circuits and significant issues that the Supreme Court, at least for a time, would not address. But there is little evidence that the Supreme Court has refrained from resolving any significant number of inter-circuit conflicts that involve recurring issues or questions of general importance. Moreover, a high proportion of the other cases deemed suitable for the National Court of Appeals involve specialized areas of tax or patent law. If more nationally-binding decisions are needed in these fields, the proper approach is to create national courts of tax and patent appeals. This not only would increase national appellate capacity for tax and patent cases, but also would benefit the courts of appeals by relieving them of such cases. Any other important cases that the Supreme Court should, but cannot now, decide could be handled under the existing system as the Supreme Court is relieved of its mandatory appellate jurisdiction.

Before we create a new national court with power and prestige exceeded only by the Supreme Court itself, we must be able to say that we are taking this momentous step because other remedial measures have been found wanting and because the gains clearly offset the disadvantages. At this time, such a statement cannot be made. The subject may warrant further study after the other proposals in this Report have been implemented; until then the National Court of Appeals proposal should not be adopted.

## CONCLUSION

In speaking about improving the federal courts, we are considering how we can make a great institution greater. The plain answer is to give the courts the capacity to do the vital work the country expects of them. The dramatic increase in the business of the federal courts shows that we as a people believe in the rule of law and trust our courts to give us justice under law. It also shows that in the 201st year of the country's life we are still devoted to the Constitution's basic concept that the judicial branch is an equal partner in our government.

The American people expect that the courts will be reasonably accessible to them if they have claims they want judged. They also expect that the courts will not be so costly that they price justice out of reach. And they expect, too, that the courts will not be so slow that justice will come too late to do any good. People also have a right to expect that when they go into the federal courts, whether as litigant, witness or juror, they will be treated with decency and dignity. In short, they are entitled to believe that the courts will be humane as well as honest and upright.

To ensure that the federal court system continues to meet these legitimate expectations, the Commitee urges that serious consideration be given to the recommendations made here. They are necessary and will immeasurably strengthen our system of justice.

Senator DOLE. Our next witnesses are Mr. Henry Brachtl and Mr. Lionel Hest of the New York City Bar Association. I would again indicate that we have to hurry up or we may have a time problem. You may be here alone.

## STATEMENT OF HENRY BRACHTL, ACCOMPANIED BY LIONEL HEST, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

Mr. BRACHTL. Thank you, Senator. My name is Henry Brachtl. I am the chairman of the Committee on Federal Courts of the Association of the Bar of the City of New York. With me is Lionel Hest who is a member of that committee and a member of the association.

We are here this morning in response to an invitation to Oscar Ruebhausen who is the president of the association, and we appear as his representatives as well as representatives of our committee.

We thank you, Senator Dole and Senator Grassley, for your invitation, and we thank the Subcommittee on Agency Administration and the Subcommittee on Courts for hearing us today.

Mr. Hest will present our views on the pending legislation.

Mr. HEST. I would like to start by also expressing my appreciation for the opportunity of the Committee on Federal Courts of the Association of the Bar of the City of New York on S. 1847. I have submitted a written statement on behalf of the Committee on Federal Courts, and we would like to have it inserted in the record.

Senator DOLE. It will be included in the record in full. You may summarize it in your remarks.

Mr. HEST. Thank you. The Committee on Federal Courts speaks from a somewhat special perspective of members of the bar who regularly appear before Federal courts to represent interests of their clients in litigation. From our vantage point, S. 1847 appears to create a potential impediment to what we believe is a proper objective of a neutral apolitical judicial forum in which cases can be litigated on the merits, free from unwarranted pressure of public opinion or politics.

In summary, we oppose this bill in all respects on the grounds that it is unnecessary, unwise, and raises serious constitutional concerns in that it would require the lower Federal courts, the Administrative Office, and the Federal Judicial Center to have their operations and programs annually authorized by Congress, and also to the extent that it would single out Federal judges for special treatment under the present statutory scheme with respect to cost-of-living pay increases which is now applicable not only to Federal judges but also to Members of the Congress and to certain officials in the executive branch.

We view S. 1847 as unnecessary in large part for the reasons that have already been given by judges Hunter and Bork, and I will not go into the same detail as they did. However, I will note, for example, that the detailed examination of a judiciary's budget by special subcommittees of the House and Senate Appropriations Committees, the frequent opportunity by representatives of the judiciary to testify on pending legislation, the extensive reports which are filed by the Judicial Conference, the director of the Administrative Office, and the Federal Judicial Council, all pursuant to statute, provide Congress with a great deal of information about the mechanics and the

administrative operations of the budget, and also the administrative operations of the judiciary.

I also emphasize what has already been noted, that although we are dealing with large amounts of money, still in all the amount of the annual Federal judiciary's budget is relatively small. It is somewhat less than one-tenth of 1 percent of the annual Federal budget. In this situation, in this context, it would seem to us that the kind of approach taken by S. 1847 is unnecessary.

We also view this bill as unwise in several respects. On an initial level, the concept of annual program authorization seems to be inappropriate to apply to the judiciary. The Federal judiciary does not have the type of substantive mission which lends itself to substantive program authorization. If it has a substantive mission, it would seem to us that it really is to decide cases and controversies before it in accordance with the Federal Laws and the Federal Constitution. That mission under our constitutional doctrine of separation of powers is not something that can properly be reviewed by Congress.

Specifically, the result reached by the judiciary in deciding cases which are brought before it is not something which Congress ought to be reviewing, nor do we think that it can constitutionally review results in specific cases that involve constitutional claims.

We also view S. 1847 as unwise because the Federal judiciary is not really engaged in a program which can readily be discontinued or cut back. As previously noted, the Federal courts, as a practical matter, must continue to operate. We can envisage serious disruptions in our legal system if, for example, for whatever reason an authorization did not come in time to permit the Federal courts to continue to process civil and criminal cases.

In addition, we also view S. 1847 as unwise because it has a potential chilling effect on the judiciary in that it could lead to a situation in which representatives of the judiciary might be asked to appear before Congress to defend their decisions under the implicit threat that Congress might express its disapproval by withholding program authorization. We think that the judiciary ought not to be subject to public opinion in this manner. We think that it should not be subject to political pressure in this manner.

In addition, as members of the bar, we have a particular interest in the integrity of the judiciary and the appearance of an impartial tribunal both to litigants and to the public at large. We think that this interest in the integrity of the judiciary and the pubic confidence in the judiciary system may be undermined if it comes to pass that representatives of the judiciary in fact are questioned in an authorization context with respect to their individual decisions.

In addition, we also view the proposed bill as raising serious constitutional concerns. The independence of the judiciary is enshrined in the Constitution in a variety of ways which are designed to preserve it as a protector of minority rights and to insulate it from political pressure exerted by a majority, whether directly or through their elected representatives.

Specifically, Federal judges are not elected. They cannot be removed from office except upon impeachment for and conviction of a treason,

bribery, or other high crimes and misdemeanors. Their compensation while in office cannot be diminished.

We see the potential for constitutional mischief in a bill which might lead to use of the authorization process to inquire of judges the basis for their decisions in individual cases.

With respect to the part of the proposed bill which would change the present statutory scheme relating to cost-of-living increases for members of the judiciary, we think that the bill is inconsistent with at least the spirit of the compensation clause in the Constitution which guarantees that the compensation received by Federal judges will not be diminished.

The practical effect of inflation is to diminish the real compensation of judges. Whether that effect is of constitutional magnitude, I leave aside. However, it seems to us that the spirit of the Constitution calls for not penalizing the Federal judiciary members by in effect reducing the real compensation they receive by not recognizing the problems that inflation does cause.

Beyond the point that the spirit of the compensation clause raises, we also think that there is a potential for misuse for the cost-of-living raise structure if it comes to pass that cost-of-living increases are used to exert pressure on the judiciary in exerting decisions in certain cases involving constitutional claims.

Judge Bork has suggested that in fact judges cannot be influenced in this respect. I hope he is right, but I think it would be unwise for the Congress to create a situation where cost-of-living increases might be held up as a method of influencing judges to reach certain results.

On a policy——

Senator DOLE. Do you think you can wrap it up? We are going to run out of time.

Mr. HEST. I have just one final note. On a policy level, we also think that it is important to provide the cost-of-living increases to help to insure that able attorneys are willing to assume the bench. In this regard, we share the concerns expressed repeatedly by Chief Justice Burger on this point.

Thank you.

Senator DOLE. With reference to the last point, we used that same argument for Members' salaries but there always seems to be plenty of candidates for Congress and for vacancies in the judgeships, whether it is district court or circuit court. Not being paid is not necessarily an argument, but there are a lot of people, let's face it, who think that you shouldn't be paid at all because you are privileged to render this public service. If you are a millionaire, you can probably accommodate that. There are about 30 some millionaires in the Senate if you count inflation.

Senator GRASSLEY. Don't look at me.

Senator DOLE. No; I'm not looking at you. We understand how sensitive the salary issue is. I think you are exactly correct that it shouldn't be used as a way to "persuade" judiciary to come along with my view or Senator Grassley's view or anyone's view.

However, we do have that responsibility. I think it is fair to say that we would not want to separate the judiciary and treat them unfairly. The problem is with Congress having enough courage to even

accept an automatic pay increase, and then it backs up and backs up, and finally you have Congress raising its pay. Then it is up to 25, 30, and I think in one case 41 percent which really causes public outcry.

I don't know anyway to solve that. I have listened to experts on how you deal with judicial- and constitutional- and executive-branch salaries.

I certainly note your statement. We are not going to single out one branch and say that we will not move on salary unless we are certain that they agree with us on abortion or prayer in school. That might be a bit unfair to say the least.

Senator Grassley, do you have a question?

Senator GRASSLEY. I would like to follow up on your comment about the spirit of the Constitution in the issue of pay. Of course, I understand the necessity for an independent judiciary and the motives which prompted some of the positions taken in your statement on this general subject. I think maybe you have taken a novel, if not radical, approach to the meaning of the Constitution. I refer to page 7 of your statement where you imply that Federal judges may not be constitutionally excepted from the Executive Salary Cost-of-Living Adjustment Act of 1975.

I say—you may disagree—that this has already occurred as the result of the adoption of an amendment offered to House Joint Resolution 370 of the continuing resolution for fiscal year 1982 which subsequently became law. That amendment provides in essence that in the future no Federal judge can be authorized an increase except as may specifically be approved by some future act of Congress—by the way, that was Senator Dole's amendment.

Senator DOLE. It was only for 1 year though.

Senator GRASSLEY. It is only for 1 year, until another continuing resolution comes along.

Are you contending that the amendment would violate the spirit of the Constitution if not be unconstitutional in itself?

Mr. HEST. I think that is correct. We are making that contention. As we view it, apart from purporting to or trying to prejudge the constitutionality of such legislation which has not been enacted, there is something inconsistent with the formulation of the compensation clause in the Constitutional Convention and the debates that led to it and the possibility that Congress might treat Federal judges specially. That is what we are addressing.

Senator GRASSLEY. I guess what you are really saying is that we cannot exercise any discretion in determining whether to increase judicial salary.

Mr. HEST. No. I don't mean to suggest that, Senator. I mean to suggest that in part it may turn on the purpose and the motivation and the effect of such legislation. If the purpose is to retaliate or to influence the judiciary in any substantive area, then we would see constitutional concern.

Senator GRASSLEY. Well, yes.

Mr. HEST. If the concern is purely budgetary, then I think there would probably be less concern for the constitutional impact.

The problem with looking at it as a budgetary mechanism is simply that the budget impact of the cost-of-living increases really isn't sub-

stantial when viewed in the context of the Federal budget or even in the context of the judiciary's budget. We are talking about a judiciary's budget which is less than one-tenth of 1 percent of the Federal budget.

Senator GRASSLEY. When I mentioned Senator Dole's amendment, you said, yes, you thought it violated that spirit of the Constitution. Senator Dole can speak for himself, but I assume he looked at it strictly from a budgetary standpoint, not in any sort of retaliation.

Mr. HEST. I would not attribute the motivation that I am concerned with to Senator Dole's bill.

Senator GRASSLEY. No.

Mr. HEST. What I am speaking about is a hypothetical situation in which a cost-of-living increase could be held up or held hostage to a particular concern for a substantive result which the courts have not been reaching. That kind of approach to legislation, we think, would raise constitutional concerns.

Senator GRASSLEY. You would subject that to a showing of intent on the part of the Congress.

Mr. HEST. Yes.

Senator GRASSLEY. I do not think you have any argument with that.

Senator DOLE. Right.

Senator GRASSLEY. However, on the other hand, if Congress makes a mistake in 1975 and we set up this automatic mechanism and we come to the conclusion for Congressmen or judges, although I know the Constitution applies differently to judges than to Congressmen, but if that is wrong, obviously, we have got a right to correct our mistake.

Mr. HEST. So long as it is not discriminatorily aimed at the judiciary, it would seem so.

Senator DOLE. I think what we have now is we separate everyone out but Members of Congress, and that is our own fault.

We find that there are some staff members making almost as much as Members of Congress with not quite the same responsibilities, the traveling around on weekends and so on and so forth.

However, I am also advised that what we originally had hoped would be a 1-year provision may be permanent. I am going to ask that a copy of the amendment be made a part of the hearing record.

[An excerpt of H.J. Res. 370 follows:]

EXCERPT OF HOUSE JOINT RESOLUTION 370

SEC. 140. Notwithstanding any other provision of law or of this joint resolution, none of the funds appropriated by this joint resolution or by any other Act shall be obligated or expended to increase, after the date of enactment of this joint resolution, any salary of any Federal judge or Justice of the Supreme Court, except as may be specifically authorized by Act of Congress hereafter enacted: *Provided*, That nothing in this limitation shall be construed to reduce any salary which may be in effect at the time of enactment of this joint resolution nor shall this limitation be construed in any manner to reduce the salary of any Federal judge or of any Justice of the Supreme Court.

Senator GRASSLEY. It is my understanding that it is permanent legislation.

Senator DOLE. Well, there is some dispute on that. I assume that the court would rule that it was temporary, but we may address that differently later.

Again, I don't have any quarrel with your testimony. I think that we are all in the same general agreement. I don't think we should use the judiciary as a whipping boy for some pet peeve I might have or some position on a specific issue.

I am not impressed by the one-tenth of 1 percent. I can give you a lot of percentages that are smaller percentages of the Federal budget which would still be a waste of the taxpayer's money. I don't suggest that is the case with the judiciary, but statistics of those kinds really don't mean very much. It is still three-quarters of $1 billion.

I think we certainly have an obligation without compromising the Constitution or the judiciary to look at expenditures.

I am not so certain that Senator Helms' approach is the correct one. I didn't mean to interrupt you.

Senator GRASSLEY. No. That is all right.

Senator DOLE. Are there any other observations you want to make in response to either Senator Grassley's comments or mine?

Mr. HEST. No. Thank you, Senators.

Mr. BRACHTL. Thank you very much.

Senator DOLE. Thank you very much. I appreciate it. Your entire statement will be made a part of the record. If there are any other matters you think you would like to include in the record, the record will remain open for 5 days.

Mr. HEST. Thank you.

[The prepared statement of the Association of the Bar of the City of New York follows:]

STATEMENT OF THE COMMITTEE
ON FEDERAL COURTS OF THE
ASSOCIATION OF THE BAR
OF THE
CITY OF NEW YORK

The Committee on Federal Courts of the Association of the Bar of the City of New York would like to thank the Subcommittee on Courts for the invitation to testify with respect to S. 1847, the "Federal Judicial Salary Control Act of 1981." We are opposed to this bill, on the grounds that it is unnecessary, unwise and raises serious constitutional concerns.

S. 1847 is unnecessary in a practical sense, in that it would require federal district and appeals courts, the Federal Judicial Center and the Administrative Office of the United States Courts to have their operations and programs authorized by Congress each year. The existing budget procedures with respect to the federal judiciary appear to work well. Each year, the judiciary's budget is examined in detail by special subcommittees of the House and Senate Appropriations Committees. Representatives of the Judicial Conference and the Supreme Court testify with respect to these budget submissions, and the staff of the Supreme Court and the Administrative Office regularly work

with Congressional subcommittee staffs with respect to budgetary matters.

In addition, pursuant to 28 U.S.C. § 331, the Chief Justice of the Supreme Court submits an annual report to Congress of the proceedings of the Judicial Conference and its recommendations for legislation. Congress also routinely receives reports of the bi-annual proceedings of the Judicial Conference, and an annual report of the Director of the Administrative Office. Representatives of the Judicial Conference and the Administrative Office also frequently testify before Congressional committees with respect to proposed legislation affecting the judiciary. For example, such representatives have testified in recent years with respect to the omnibus judgeship bill, bills to realign the United State Court of Appeals for the Fifth Circuit, and bills to reform those sections of the United States Code which govern diversity of citizenship jurisdiction.

Moreover, program authorization and policy review of judicial operations cannot be justified on the grounds that the federal judicial budget is so substantial in size or has grown so rapidly as to warrant Congressional oversight pursuant to S. 1847. Since 1940, only about one tenth of one percent of the annual federal budget has been attributable to the federal judiciary.

S. 1847 also appears to us to be unwise. If it is enacted, it may prove difficult to draw the line between oversight with respect to judicial housekeeping policies and practices, and oversight with respect to judicial decisions. Accordingly, we are concerned that S. 1847 could be abused so as to place the federal judiciary under Congressional control.*

It would be unwise to require judges and representatives of the federal judiciary to appear before Congress to defend their decisions or policies, under the implicit threat that Congress might express its disap-

---

* It is worth noting that in 1939, Congress enacted the existing legislation with respect to the submission of the budget of the federal judiciary in reaction to the unseemly prior practice of having the judiciary's business and budgetary needs provided for by the Department of Justice, which frequently appears before the courts in a litigative capacity. Eliminating the prospect that the executive branch might exert undue pressure on the judiciary in the budget submission process, 28 U.S.C. § 605 provides that annual estimates of the expenditures and appropriations for lower federal courts and the Administrative Office shall be prepared under the supervision of the Judicial Conference of the United States and shall be included "without revision" by the Bureau of the Budget in the budget which is submitted by the President. See Chandler, Some Major Advances in the Federal Judicial System, 1922-1947, 31 F.R.D. 307, 372-392.

Similarly, 31 U.S.C. § 11 provides that the President shall include "without revision" in his proposed budget the Supreme Court's estimated expenditures and proposed appropriations.



91-266 O - 82 - 8

proval by withholding program authorization.* As members of the Bar, we value the role of the federal courts in providing a neutral, apolitical forum in which private litigants can pursue their claims and defenses, whether or not in cases involving constitutional questions. Parties to litigation generally do not fear that a judge's decision in their case will be influenced by the popular support or opposition that their positions may generate. We also believe that respect for the rule of law in this country is enhanced when the public perceives that the judiciary is free from political pressure. We remember all too well the remarkable role which an independent judiciary played during the 1970's, at a time when the integrity of the executive branch was called in question; we do not relish the possibility that if S. 1847 is enacted, the judiciary might be subjected to political pressure from the legislative branch.

Indeed, the prospect of political pressure is also

---

* The concern we express today for the independence of the federal judiciary is similar to that which this Association has expressed in opposing pending legislation to divest the federal courts of jurisdiction to hear certain constitutional claims or to order certain remedies, on the grounds that such bills are "probably unconstitutional and certainly unwise." See Committee on Federal Legislation, Jurisdiction-Stripping Proposals in Congress: The Threat to Judicial Constitutional Review, 36 Rec. A.B. City N.Y. 557, 601 (1981).

unwise in that it raises serious constitutional concerns and the undesirable prospect of an ongoing confrontation between the judiciary and the Congress. The independence of the judiciary is enshrined in the Constitution in a variety of ways which are designed to preserve it as the protector of individual rights against the will of the majority:

(i) Federal judges are not elected.*

(ii) Federal judges may not be removed from office except upon impeachment for, and conviction of, treason, bribery or other high crimes and misdemeanors.**

(iii) Federal judges receive compensation which cannot be diminished during their continuance in office.***

Moreover, the independence of the judiciary and its essential role in reviewing the actions of the executive and legislative branches of the federal government is at the core of our constitutional system of checks and balances and separation of powers. In establishing

---

* Pursuant to Article II, § 2 of the Constitution, the President has the power, with the advice and consent of the Senate, to appoint federal judges.

** Article II, § 4 and Article III, § 1 of the Constitution.

*** Article III, § 1 of the Constitution.

the doctrine of judicial review early in the Republic's history, the Supreme Court in Marbury v. Madison, 5 U.S. 137 (1803), explained:

> "It is emphatically the province and duty of the judicial department to say what the law is."

In light of these provisions, serious questions are raised as to the potential for constitutional mischief in the application of S. 1847, to the extent that it calls for program authorization and policy review of the operations of federal district courts and courts of appeals. These concerns are highlighted by the possibility that the intended focus of program oversight will be unpopular or controversial judicial decisions and policies in areas involving constitutional rights, just as such decisions are now the motivating force behind some 30 pending jurisdiction-stripping bills. If Congress cannot constitutionally enact such jurisdiction-stripping legislation, it is questionable whether it can indirectly achieve the same objective, by subjecting federal courts to "program oversight" whenever Congress disapproves of the decisions of the courts in such cases or wishes to discourage the courts from reaching a certain result. The Supreme Court's opinion in United States v. Klein, 75 U.S. 85 (1869) is instructive in this regard, in that it strongly suggests that Congress cannot constitutionally prescribe a "rule of decision" in

cases before the judiciary. Can Congress "jawbone" the courts to reach a result which it cannot legislate?

S. 1847 also raises serious questions as to its consistency with the spirit and intent of the Compensation Clause, Article III, § 1 of the Constitution, to the extent that it purports to except federal judges from the "automatic" cost-of-living pay increase provisions in the Executive Salary Cost-of-Living Adjustment Act of 1975 [P.L. 94-82]. The Constitutional Convention specifically considered and rejected a proposal to prevent salary increases for judges during continuance in office, "largely on the practical ground that the cost of living might rise . . ." Hart and Wechsler, The Federal Courts and the Federal System, 7 (2nd ed. 1973), and out of "concern for the ravages of inflation." United States v. Will, 449 U.S. 200, 220 (1980).

Moreover, we wholeheartedly agree with the Supreme Court's observation in United States v. Will, supra, concerning the purposes of the Compensation Clause:

> "As well as promoting judicial independence, it ensures a prospective judge that, in abandoning private practice--more often than not more lucrative than the bench--the compensation of the new post will not diminish. Beyond doubt, such assurance has served to attract able lawyers to the bench and thereby enhances the quality of justice. [citations omitted]" 440 U.S. at 221.

It seems to us that the proposed change in the present statutory scheme with respect to cost-of-living increases

for the judiciary can only frustrate the fulfillment of these purposes.

Finally, budget considerations would not appear to warrant singling out the judiciary for special treatment with respect to cost-of-living increases. No substantial budget savings are likely to result from legislation which would require specific Congressional authorization for cost-of-living increases for federal judges, but permit continued "automatic" cost-of-living increases for members of Congress and certain federal executive officers and employees.

To be sure, Article III grants Congress the power to "ordain and establish" federal district courts and courts of appeals, and it can be argued that the "plenary" power to create such courts necessarily includes the power to subject them to Congressional oversight. But, Congress' authority over inferior federal tribunals must be exercised in a manner which is consistent with other provisions of the Constitution. See Williams v. Rhodes, 393 U.S.23, 29 (1968). As we see it, S. 1847 is plainly inconsistent with the spirit of the express provisions in the Constitution that are intended to assure an independent federal judiciary, and would do violence to the constitutional scheme.

It can also be argued that nothing in the Constitution expressly states that there cannot be Congres-

sional program oversight of the federal judiciary, or that a specific act of Congress cannot be required in order to give judges a cost-of-living increase. But, there are things that the Constitution does not expressly prohibit that are plainly unconstitutional or at least of dubious constitutionality. Read literally, there is nothing in the Constitution that expressly precluded President Roosevelt from proposing legislation to pack the Supreme Court in order to accomplish a political objective. In rejecting this proposal, the Senate Judiciary Committee wisely observed in 1937:

> "If we yield to temptation now to lay the lash upon the Court, we are only teaching others how to apply it to ourselves and to the people when the occasion seems to warrant. Manifestly, if we may force the hand of the Court to secure our interpretation of the Constitution, then some succeeding Congress may repeat the process to secure another and a different interpretation and one which may not sound so pleasant in our ear as that for which we now contend.
>
> Shall we now, after 150 years of loyalty to the constitutional ideal of an untrammeled judiciary, duty bound to protect the constitutional rights of the humblest citizen even against the Government itself, create the vicious precedent which must necessarily undermine our system? . . .
>
> . . . Let us now set a salutory precedent that will never be violated. Let us, of the Seventy-fifth Congress, in words that will never be disregarded by any succeeding Congress, declare that we would rather have an independent Court, a fearless Court, a Court that will dare to announce its honest opinions in what it believes to be the defense of liberties of the people, than a Court that, out of fear or sense of obligation to the appointing power or factional

> passion, approves any measure we may enact. We are not the judges of the judges. We are not above the Constitution.
>
> . . . Exhibiting this restraint, thus demonstrating our faith in the American system, we shall set an example that will protect the independent American Judiciary from attack as long as this Government stands."*

We respectfully submit that this Subcommittee should make the same observation with respect to S. 1847.

## CONCLUSION

For the reasons set forth herein, we urge rejection of S. 1847 in its entirety.

Dated: New York, New York
February 25, 1982

Respectfully submitted,

The Committee on Federal Courts
of the Association of the Bar
of the City of New York

Henry A. Brachtl, Chairman

Committee Members Lionel G. Hest, Esq. and Melvyn L. Cantor, Esq. were the principal drafters of this Statement.

---

* S. Rep. No. 711, 75th Cong., 1st Sess. 9, 13-14 (1937).

Senator DOLE. As I understand, we change hats now and Senator Grassley will preside over the second half of these hearings.

Before we do that, I understand that Senators Thurmond and Grassley had several questions which we will submit to the last two witnesses. Perhaps you can respond in writing for the record. We will make those available before you leave. Thank you.[1]

Senator GRASSLEY. Our next panel consists of a distinguished group of lawyers and legal scholars: Mr. Paul Kamenar, Dr. Kenneth Holland, and Mr. Ed Dowd. I would like to have all three come to the table.

Mr. Kamenar is currently the director of litigation at the Washington Legal Foundation. Prior to March 1980, Mr. Kamenar was associated with a private law firm and was also associated with the Federal Elections Commission. The Washington Legal Foundation is a nonprofit public-interest law firm specializing in cases dealing with Government regulations, victims of violent crimes, free enterprise, and constitutional law.

Dr. Holland is a professor of political science at the University of Vermont. Prior to his present position, he was associated with the University of Wisconsin in a similar capacity. Dr. Holland specializes in constitutional law and the judicial process, and he has published several articles on these subjects. His current work dealing with the application of Federal wage and price controls to the State judicial salaries will appear soon in the Justice System Journal.

Mr. Dowd is the director of research at the National Legal Center for the Public Interest. He has held this position since 1976. Prior to that time, he was associated with the Bendix Corp., as their international legal adviser in Paris. The National Legal Center is a nonlitigating public-interest law center concentrating on economic and constitutional issues.

Gentlemen, I would ask you to proceed in the way that I have introduced you.

## STATEMENT OF PAUL KAMENAR, DIRECTOR OF LITIGATION, WASHINGTON LEGAL FOUNDATION, ACCOMPANIED BY PROF. KENNETH M. HOLLAND, DEPARTMENT OF POLITICAL SCIENCE, UNIVERSITY OF VERMONT, AND EDWARD H. DOWD, DIRECTOR OF RESEARCH, NATIONAL LEGAL CENTER FOR THE PUBLIC INTEREST

Mr. KAMENAR. Thank you, Senator. I will then go first. My name is Paul Kamenar. I am the director of litigation at the Washington Legal Foundation. Besides the areas that you mentioned, Senator, that we get involved in, we have represented over 100 U.S. Senators and Members of Congress in various constitutional cases that affect the rights and prerogatives of the Congress.

Accordingly, we are particularly sensitive and appreciative of the purpose of this bill which is again to reassert the clear right and duty, as we see it, of the Congress in this particular area of budgetary matters dealing with the judiciary.

[1] Responses of Messrs. Brachtl and Hest can be found in the appendix, p. 174.

I will be very brief in my comments. I have prepared written testimony which I will submit for the record. I just want to touch on a couple of highlights of those comments.

We believe, basically, that this bill is definitely in the public interest. It does remedy a problem that was created by the *U.S.* v. *Will* decision; and, therefore, it does obviate the problem that we had last term with respect to the automatic backdoor pay increases.

What we are doing, basically, is again reasserting the rights of Congress here and thereby not violating any constitutional provision as I see it. In fact, the Congress is on clear constitutional grounds here to act in this manner. That is basically what section 4 is all about.

Section 3 deals with the entire Federal judiciary, not just salaries. It goes to expenses. I believe Senator Dole is correct that we do not need to necessarily focus on the percentage of the GNP or the budget, rather, of the judicial expenses. However, these are millions and millions of taxpayer dollars involved, and I think the taxpayer has a right to know what this money is being spent for and whether it is being spent in a wasteful or efficient manner.

I have some technical problems with some of the things in section 2 with the definition of the Federal judiciary. I have pointed that out in my testimony, and in briefly looking at Judge Bork's testimony, he also pointed out basically the same things that I covered there so I will not go into it.

I did want to emphasize one area with respect to the judiciary. We left out the tax court judges. Tax court judges and bankruptcy judges are viewed as article 1 judges as opposed to article 3 judges. We have covered the bankruptcy judges. I think we should cover the tax court judges.

There is a case pending before the Supreme Court right now that deals with bankruptcy judges, whether in fact it is unconstitutional that they have a fixed term of years, of 14 or 15 years. It may be that they act and walk and talk like a court—an inferior court under article 3—therefore, they may be an article 3 type court. They may therefore be subject to life tenure. Therefore, that is all the more reason why we want to make this bill as comprehensive as possible. Therefore, I would also take a look at tax court judges and their expenses as well.

Again, just to summarize this whole issue, Congress definitely has a clear authority here in this area. We are talking about looking at the expenses of the judicial branch.

No one focused this morning on something that may come out in oversight in the hearings on the judiciary which is what revenue is coming in for the judicial branch? One may say, "Well, the judiciary is not conceived as being a revenue-enhancing type of a branch," but in fact they could. The truth of the matter is that a litigation is very, very cheap. That sounds like a strange statement coming from a lawyer concerning the cost of litigation, et cetera, but to file a major antitrust action between parties that could drag on for years and years and take hundreds and thousands of hours of the judge's time and the clerk's time and the court's time may only cost the party a $10 filing fee.

My goodness. If you get a traffic ticket in the State Court of Virginia, it takes 2 seconds for the judge to rule that you are guilty of the violation which is $30 or $40 court cost. It is amazing that type of a figure is so low in the judicial branch. It may be that we might want to start looking at the concept of "user's fees." Who uses the judiciary? The parties do. Criminals use the judiciary. I am not sure whether in fact they are imposed court costs which then could help to defray the expenses. This is looking at the other end of the equation. One is, of course, looking at the expenses, but we might want to look at the other side, too.

That is basically the quick observation that I have. At this point, I would like to ask that we go on to the next speaker.

Dr. HOLLAND. Yes. I would like to thank Senator Grassley and Senator Dole for the opportunity to address these two subcommittees on the merits of the bill.

In the first place, the bill is in my opinion clearly constitutional. The framers of the Constitution were clearly aware that the language of article 3, section 1, permits Congress to employ its control over salary increases to award and punish the judiciary.

In order to avoid this kind of influence, Madison supported a prohibition on increases and a scheme of indexing that would have the effect of granting to judges automatic cost-of-living raises. The Constitutional Convention, however, rejected both of these measures and gave Congress complete control over salary raises.

This must be contrasted with this decision to prohibit congressional increases in Presidential salaries.

The framers did not believe that the use or the abuse of this power would seriously compromise the independence of the judiciary. They thought that tenure during good behavior and a ban on diminishing salaries were sufficient guarantees of judicial independence of the legislative and executive branches.

The bill is nondiscriminatory and thus meets the test laid down by the Supreme Court in *O'Mally* v. *Woodrough*, a case dealing with the taxation of judicial salaries, and the Court of Claims in *Atkins* v. *United States*, a case concerning the effect of inflation on judicial compensation.

Under the rule of nondiscrimination, it would not be constitutional to establish a system of merit raises for judges whereby Congress could reward or punish individual judges, giving some district court judges 10-percent raises for example and others 5-percent increases. This bill, however, does nothing of the kind.

Finally, with regard to the constitutional issues, even if the motivation of the bill supporters is to express congressional displeasure with particular decisions of the Supreme Court, that fact alone does not render the bill unconstitutional. In ex parte McCardle, the case involving the constitutionality of a statute stripping the Supreme Court of jurisdiction over a class of cases, the court held, "We are not at liberty to inquire into the motives of the legislature."

I see, therefore, no constitutional grounds for objecting to the bill presently before you. Moreover, the bill would accomplish several de-

sirable policy goals. First, it would remove the inequity between judicial- and other executive-level salaries created by *United States* v. *Will*. Second, the bill would encourage judges to appear in person before Congress, a healthful practice in a democracy. It would also give Congress the opportunity to express displeasure with judge-made policies.

Third, the bill would acknowledge that the determination of judicial salaries is essentially a legislative and not executive function. Finally, the bill would eliminate the need for a legislative-veto mechanism, a mechanism whose constitutionality has been cast in serious doubt.

Senator GRASSLEY. Thank you. Mr. Dowd?

Mr. DOWD. Senator Grassley, first of all, on behalf of the National Legal Center, I would like to thank you for the invitation to appear before this subcommittee.

The National Legal Center, I should point out, is a nonlitigating public-interest law center which has a continuing interest in a judiciary and a judicial process.

For example, in 1977, we sponsored a conference on the role of the judiciary in a democratic society. That conference, I believe was the first national event at which what we now call "judicial activism" was considered.

We have tentatively scheduled a second conference on basically the same subject this coming fall. Thus, our interest in S. 1847 is a normal outgrowth of that interest in the general subject of the judiciary.

Basically, we support the intent of the bill which is to submit funding requests by the judicial branch to congressional scrutiny, and also to give Congress the opportunity to establish salaries for the judicial branch independent of the executive branch and the executive branch's recommendations.

This is, we believe, in conformity with the constitutional responsibilities of Congress concerning the authorization and expenditure of tax dollars.

The requirement in section 3 for congressional approval serves, we believe, the public interest by confirming the coequal status of the judicial and legislative branches. It in effect denies the supremacy of the judiciary over the other two branches.

In addition, we feel that by requiring specific congressional approval which in turn requires judicial-branch justification of its request, the judicial branch becomes more aware of the financial constraints on the Government, and it is more inclined to operate within the overall budget of the Federal Government.

Section 4 which concerns salary increase does two things which we believe are important. First, it requires positive action by Congress to grant salary increases rather than negative action which Congress would take hurriedly, perhaps, to beat the clock and without the benefit of debate simply to deny salary increases for the judicial branch.

The second reason, which is perhaps more important is the requirement of the specific act of Congress providing for salary increases for judges, avoids, we think, putting the court in a possible position of conflict of interest which would arise whenever they are called upon to rule on the legality of their own salary increases.

As I said, we support the intent of S. 1847, but we do recognize two potential areas of concern. The first, as has been mentioned previously, is increased appearances by judges before appropriations subcommittees obviously increases the opportunity for improper questioning about judicial matters rather than financial matters.

We do not consider this to be a particularly serious probability because it does not arise during the current authorization-appropriations process, but it would probably be prudent to consider ways to avoid this.

One way would be to exclude from questioning all actions by the judges which could be deemed judicial in nature; that is, case selection, case decision, and limit questions to those instances where the judicial branch acts as an administrator, employee, employer, or in some other nonjudicial capacity.

The second problem is one we have not really looked at, but it may very well exist. If Congress fails to appropriate money by October 1, under section 3, to pay the salaries of judges, presumably the judges will not be paid. If this is so, then this might very well amount to a de facto reduction in salary for the judges, something which is prohibited by the Constitution. The Constitution clearly states, "Judges shall not suffer a diminution of salary during their tenure in office."

To avoid this, one could delete from section 3 all reference to either judicial salaries or salaries entirely.

In conclusion, subject to the two concerns we have just discussed, we support S. 1847. Thank you, Senator.

Senator GRASSLEY. Thank you.

In regard to your point about the questioning of judges who come before the Appropriations Committee, concerning the possibility that they could be asked questions involving potential philosophy or legal interpretations as opposed to the administrative things that they might be asked, do you have any language limiting the bill that you could suggest to us?

Mr. DOWD. To tell you the truth, Senator, I started to draft something, but I was not happy with it so I didn't bring it with me.

Senator GRASSLEY. You do have some language drafted?

Mr. DOWD. Well, we have a draft in the office, but I was not satisfied with the language.

Senator GRASSLEY. Oh, so you can submit that to us.

Mr. DOWD. I can't submit it right now, Senator, but I would be more than happy to submit something to you by letter.

Senator GRASSLEY. I would like to have you do that.

Mr. DOWD. All right.[1]

Senator GRASSLEY. Mr. Kamenar, are you aware of any agency, department information, or any other governmental entity which operates under a funding mechanism similar to that imposed or employed by the judiciary?

Mr. KAMENAR. That is a question that I am not really altogether sure of the answer. I do not think so. This bill, as I understand, would basically put the judiciary on the same budgetary level or procedure as is the Justice Department, the State Department, and various intelligence areas.

[1] Mr. Dowd's letter with proposed amendments to S. 1847 can be found in the appendix, p. 172.

Senator GRASSLEY. Yes; that is the point of my question. I am asking you, in other words, how the judiciary is different now, whether you know of any other governmental entity that has the same funding mechanism?

Mr. KAMENAR. Not that I am aware.

Senator GRASSLEY. I noticed in your testimony, Mr. Kamenar, that you suggested that the executive branch has merely acted as an agent for the Congress in fixing payscales. You then cite the *Atkins* case. I would like to have you elaborate on that point.

Mr. KAMENAR. Well, basically, the way the mechanism works now is that the law allows the President to be basically legislating and the Congress to be vetoing what he recommends for pay salaries. In effect, it turns the Constitution on its head. The normal procedure is for Congress to pass the law and for the President to veto it.

When you have a legislative veto, you are switching the roles here. What this bill would do is basically right itself up, so to speak, and in fact, it may be required. In my testimony, there is the U.S. Court of Appeals decision for the District of Columbia Circuit that Judge Bork spoke about, the *Consumer Energy Council* v. *FERC*, which ruled that the legislative veto was unconstitutional. It violated separation of powers, et cetera. There is another case, *Chada* v. *Immigration Naturalization Service*, pending before the Supreme Court now which also will be addressing this issue. There it may be even required, not just as a matter of public policy but as a matter of the interpretation of constitutional law that this bill be enacted and require annual authorizations of this kind as opposed to having the executive be the agent for the Congress.

Senator GRASSLEY. The Court of Claims did uphold the veto in the *Atkins* case.

Mr. KAMENAR. It did in the *Atkins* case, but that was a Court of Claims decision. Cert was denied by the Supreme Court. It was not really reviewed as a legislative veto case.

I would like to also point out that in the *FERC* case, the court did dance around the *Atkins* decision somewhat by perhaps suggesting that there may be some exemptions to this, but nevertheless it is not on firm constitutional ground. Perhaps this bill would lay to rest any objections, and in fact put the Congress back in charge of this process.

Senator GRASSLEY. You mentioned in your testimony that this bill, if it were passed, would allow Congress to determine existing problems in the judiciary. In other words, it would serve as a communication tool for those purposes. You mentioned examples like case backlog and additional staffing needs.

Is your intention that Congress would then end up taking a more active role in eradicating some of these problems that exist in the judiciary?

Mr. KAMENAR. I would think so, Senator. I think, as the prior panel indicated, there has been some oversight functions exercised by the Congress in this area. I think that there has not been enough. This bill would have a residual effect in that regard because it would act as a catalyst to have the Congress review the budgetary matters to see exactly where the problems are in terms of the expenses to run the judiciary. If there is a case backlog, what is the cause of that?

It may very well be, as I mentioned earlier, that the cost of litigation is low and you may want to raise that cost by having higher filing fees. You would get rid of a lot of these pro se cases, et cetera, where if they know that they can't get away with tying up the courts in years of litigation for a $10 filing fee and it is going to cost them $200, that might reduce the case backlog there, at the same time bring revenue out of the process.

This bill would serve that function, I believe.

Senator GRASSLEY. Dr. Holland and Mr. Dowd, I would like to have you comment on that same question.

Mr. DOWD. I don't think I really have anything much to add to what Mr. Kamenar says, but I do think that his approach to the question of revenue producing by the judicial branch is an interesting facet which I really hadn't thought about.

Senator GRASSLEY. What about the immediate question about getting Congress more involved in solving some of these problems that the judiciary has?

Mr. DOWD. Well, I would agree. I think Congress does, in fact, have a duty to be involved to the extent that it does not impinge upon the judicial aspect or the judicial independence of that particular branch. I am limiting the independence to case selection or case decision or anything dealing with functions as a judge.

Senator GRASSLEY. Dr. Holland?

Dr. HOLLAND. Yes; I think that the authorization aspect of the bill could be very, very valuable because as Judge Bork pointed out, the present system simply is not working and we need to look at things his alternative dispute resolution mechanisms. He mentioned, perhaps, more article 1 tribunal neighborhood justice centers, more arbitration-mediation services, that kind of thing. I would see that the authorization aspect of the bill is actually creating an opportunity for the Congress to become more involved and more creative in looking at alternatives to ways of resolving disputes.

The judges themselves in the bar are really not going to take the lead in this area. You are going to get better advice from political scientists and sociologists than you will get from judges and from lawyers because they are trained in the traditional system.

The search for alternative dispute resolution mechanisms is, I think, going to come from social scientists primarily.

Senator GRASSLEY. I want to repeat what Senator Dole said that the record would stay open for 5 days if any of you have anything further you want to submit.

I would also like to make a couple of clarifying points for the record that have previously been brought up in this hearing. In 1979, the court filing fee was increased from $10 to $60.

Mr. KAMENAR. What district was this in?

Senator GRASSLEY. I assume that would have to be the entire Federal judiciary.

Mr. KAMENAR. No; each district, as I understand it, sets their own filing fee. I know, for example, in this district court it is only $10.

Senator GRASSLEY. All right.

Mr. WELLER. Senator Grassley, under 28 U.S.C. 1914, subsection (a), as amended on October 1, 1979, the filing fee in the U.S. courts is $60 everywhere but the District of Columbia.

Mr. KAMENAR. Everywhere but the District of Columbia. I stand corrected. In the District it is only $10.

Mr. WELLER. Senator, I would like to clarify one other point, as long as I have the opportunity. All receipts by Federal courts are paid directly to the Treasury. Our clerks are merely transmittal agents. All of that money is paid directly into the general Treasury of the United States.

Senator GRASSLEY. Then I would also like to clarify that the Tax Court is a part of the executive branch, not the Federal judiciary.

Mr. KAMENAR. It has been suggested by some constitutional scholars that as the bankruptcy judge goes before the Supreme Court, so may the status of Tax Court judges. I am just bringing to the committee's attention that they may want to include that since those cases are appealable to the Supreme Court. It is all part of the judicial process. They adjudicate disputes and they look like courts, they act like courts, and they are courts.

Senator GRASSLEY. Our meeting is coming to a conclusion at a very appropriate time because I have to vote. I want to thank not only you three gentlemen for your participation as the final panel but all of today's witnesses.

To the extent some of you are going to or have suggested language in amendment to the bill, we appreciate that. We also very much appreciate your basic philosophical positions that have been individually and collectively expressed.

[The prepared statements of Messrs. Kamenar, Holland, and Dowd follow:]

Testimony of

Paul D. Kamenar, Director of Litigation,

WASHINGTON LEGAL FOUNDATION

before the

United States Senate

Committee on the Judiciary

Subcommittees on Courts and Agency Administration

regarding

S. 1847, the "Federal Judicial Salary Control Act of 1981"

February 25, 1982

## INTRODUCTION

I am Paul D. Kamenar, Director of Litigation for the Washington Legal Foundation. On behalf of the Washington Legal Foundation, let me express my appreciation to the distinguished members of the Senate Judiciary Subcommittees on Courts and Agency Administration for this invitation to testify on S. 1847, the "Federal Judicial Salary Control Act of 1981."

The Washington Legal Foundation ("WLF" or "Foundation") is a non-profit, national public interest organization with 80,000 members which engages in litigation and the administrative process in matters affecting the broad public interest. WLF devotes a substantial portion of its resources to defending individual liberty, including the rights of crime victims, and to promoting the free enterprise system, a strong national defense, and limited governmental regulation. WLF has represented over 100 United States Senators and Congressmen in litigation involving significant issues of the constitutional rights of Congress. Accordingly, we are particularly appreciative of the purpose of this bill which is to reassert Congress' clear authority over the expenditure of taxpayers' funds and to ensure that those funds are wisely spent.

From time to time, we have been invited to testify before

91-266 O - 82 - 9

the Congress on the public interest aspects of pending legislation although the Foundation, as an organization, does not advocate the passage or defeat of legislation.

COMMENTS

The Federal Judicial Salary Control Act of 1981 has two key provisions. Section 3 provides for an annual Congressional authorization process for appropriating funds for the operation of the Federal Jucidiary, excluding the Supreme Court. Section 4 provides that no Federal Judge, including Supreme Court Justices, shall receive an increase in pay or retirement benefits unless it is specifically authorized by a separate act of Congress. The Washington Legal Foundation believes that this legislation is in the public interest because Congress has the Constitutional authority and duty to fix judicial compensation and to appropriate funds for the Federal Judiciary. Furthermore, yearly review of such expenditures would enable the Congress to exercise its oversight functions.

The need for this remedial legislation is readily apparent from an examination of the current laws on the fixing of judicial salaries. The current method of calculating the salaries of the Judiciary is through an interlocking network of federal statutes whereby Congress has delegated to the President the task of fixing judicial pay scales. 2 U.S.C. §§351-361, 5 U.S.C. §§5305, 5306. The Commission on Executive, Legislative, and Judicial Salaries makes a recommendation to the President, who in turn submits a recommendation to Congress. The President's recommendations for an increase in judicial authority automatically become law within 30 days of his transmittal of the budget unless either House of Congress has enacted legislation which specifically disapproves all or part of the President's recommendation.

Should Congress manage not to act on the President's recommendation for a judicial salary increase by passing a specific resolution, the salary increase automatically takes effect. Under

the Executive Salary Cost-of-Living Adjustment Act of 1975 and the Pay Comparability Act of 1970, there is a virtually automatic built-in annual salary increase which the President recommends to Congress every year.

Despite a provision in the fiscal year 1982 continuing resolution package capping judicial salaries, the salary increases took effect anyway because the resolution was passed at 12:27 a.m. on October 1, 27 minutes after the September 30 deadline for Congressional action. The Supreme Court has recently held that repealing a judicial salary increase after it takes effect on October 1, the beginning of the new fiscal year, would technically violate the Compensation Clause in Article III of the Constitution prohibiting reductions in judges salaries. United States v. Will, 449 U.S. 200 (1980). Thus, the salaries were increased even though Congress did not intend to authorize the increase. While we are mindful that the purpose of Article III, Section 1 is to ensure an independent judiciary, we believe that such automatic salary increases frustrates the duties of Congress.

Section 4 of this Bill would resolve this situation because it specifies that any increase in judicial salaries must be provided by a separate act of Congress authorizing an increase. Congress clearly has the legal authority to revoke the delegation of this duty to the President. The courts have held that the President in fixing pay scales has merely acted as an agent for the legislative branch and that the pay-setting function has historically resided in the legislative branch anyway. U.S. v. Atkins, 556 F.2d 1028, (Ct. Cl. 1977)(per curiam), cert. denied, 434 U.S. 1009 (1978).

We should note, however, that recent judicial decisions cast serious doubt on the validity of the constitutionality of the legislative veto. In Consumer Energy Council of America v. Federal Energy Regulatory Commission, No. 80-2184, slip op. (U.S. Ct. App. D.C. Cir. Jan. 29, 1982) the U.S. Court of Appeals for the D.C. Circuit ruled that the one-House veto of

agency rulemaking was unconstitutional. The Court discussed at some length the Atkins decision, slip op. at 40-41, but indicated that the pay veto issue may be distinguishable. Further, the Supreme Court is currently considering Chadha v. Immigration and Naturalization Service, 634 F.2d 408 (9th Cir. 1980) on yet a narrower issue of the House veto. The point we are trying to make is that not only does Congress have the power to legislate directly in this area of judicial salaries but may as a matter of law be required to do so.

In addition to its Constitutional authority in this area, the internal rules of the Senate and House provide for the limits or contours of the exercise of that authority. For example, paragraph 2 of Senate Rules XVI precludes "an appropriation bill containing amendments proposing new or general legislation." The House has a similar rule. The chief purposes of these rules are to prevent Appropriations Committees from swallowing up the legislative business of other committees, and to separate the substantive policy decisions (such as whether the judiciary is to receive a pay increase) from the financial or budgetary decision-making.

There is clearly no constitutional barrier to requiring specific authorization of salary increases and the Senate itself in its Rules has expressed its preference for substantive matters to be legislated by authorization and not appropriation.

In addition to the legal authority Congress has for enacting this legislation, public policy considerations further justify its purpose. S. 1847 would allow Congress the opportunity to form its own coherent budget policy for the judiciary. Under its provisions Congress will be able to define periodically budget objectives and specify a desired level of funding rather than working from the figures furnished by another branch of the government. Congress would also be able to review the administration of the Federal Judiciary to determine existing problems such as case backlog or additional staffing needs.

We believe that Section 3 of S. 1847 is an important provision because it will provide the Congress with a better opportunity to examine the total financial needs of the Federal Judiciary, not just judicial salaries. By requiring yearly authorizations for the financing of the Federal Judiciary, the Congress can better exercise its important oversight responsibilities which need not jeopardize the independence of the judicial branch.

In dollar amounts alone, the amount of taxpayers' funds spent on the salaries and expenses of the Federal Judiciary (as defined in Section 2) is not insignificant. As the following figures demonstrate, the cost to the taxpayer of the operation of judiciary is quite large and growing rapidly:

| | 1981 Actual | 1983 Estimate |
|---|---|---|
| Supreme Court | | |
| Salaries & Expenses | $ 11.8 million | 12.9 million |
| Building & Grounds | 1.5 | 2.0 |
| Court of Customs and Patent Appeals | | |
| Salaries & Expenses | 1.9 | 2.6 |
| U.S. Court of International Trade | | |
| Salaries & Expenses | 5.1 | 5.7 |
| Court of Claims | | |
| Salaries & Expenses | 5.7 | 8.1 |
| Courts of Appeals & District Courts | | |
| Salaries & Benefits | 54.7 | 63.5 |
| Supporting Personnel (secretaries, law clerks, magistrates, etc.) | 232.9 | 297.1 |
| Federal Public Defender (includes representation pursuant to Criminal Justice Act of 1964) | 27.9 million | 34.1 million |
| Jurors & Commssioners | 41.1 | 47.7 |

| | 1981 Actual | 1983 Estimate |
|---|---|---|
| Expenses of Operation & Maintenance of the Courts | 41.8 | 70.4 |
| Bankruptcy Courts | | |
| Salaries & Expenses | 68.2 | 94.1 |
| Space & Facilities for U.S. Courts of Appeals, District Courts, & Bankruptcy Courts | 105.5 | 158.1 |
| Administrative Office of the U.S. Courts | | |
| Salaries & Expenses | 17.1 | 25.5 |
| Federal Judicial Center | 9.2 | 8.5 |
| TOTALS | $ 624.4 million | $ 830.3 million |

Source: Budget of the United States Government -- Fiscal Year 1983, Appendix at I-B1-B13.

As one can see, the amount of funds involved are indeed substantial, even if we subtract the amounts for the Supreme Court which is excluded from the operation of Section 3 of S. 1847. By requiring annual authorizations for the Federal Judiciary, this bill would merely place the Federal Judiciary on the same budgetary procedure as that of the Justice Department, State Department, and intelligence activities.

Because of the oversight function involved in annual authorizations, Congress will be in a better position to assess the financial needs and operations of the judiciary. Perhaps there could even develop from such a process a reform in the way funds are assessed to users of the judiciary. For example, I cannot understand why the filing fee for a civil case in the U.S. District Court is only $10-$20, depending on the judicial district. Private antitrust actions involve hundreds of hours of judicial time and court costs and yet the only cost assessed by the Court is $10.00 for filing the case. This sum is outrageously low when one considers that the court costs assessed in a simple traffic ticket in a State Court is approximately $30-$50 for only the few minutes it takes to process the charge.

On the other hand, I cannot understand why the U.S. Court of Appeals charges an outrageously high price of $.50 per page for photocopying public court records when the actual cost is more like $.10 a page (which is the per page amount charged by the Supreme Court for photocopying). As part of developing the concept of "user fees", perhaps convicted federal criminal defendants should be required to defray part or all of the court costs, including the services of public defenders. Even if some criminals are indigent, they should nevertheless be assessed some charge, which may even be "garnished" from whatever money earned while in prison or on probation. Such funds could be used to defray the expenses of the judiciary, or even be used to compensate the victims of crime.

Finally, we would like to bring to the subcommittees' attention some minor technical recommendations, some of which may be of significance.

Section 2(1) purports to include in the definition of "Federal Judiciary" all U.S. District Courts, including Guam and the Virgin Islands. There is also a district court for the Northern Mariana Islands, which should be added. Section 2(1) unnecessarily includes "the Court of Customs." The nomenclature of that court has been changed to the United States Court of International Trade which is specifically covered under Section 2(8).

We note also that there is no mention of the Tax Court. Although the salary for a Tax Court judge is pegged by law to the salary of a District Court judge (26 U.S.C. §7443(c)), we believe that the legislation should make it clear that they are also covered. This is especially necessary for purposes of Section 3 which includes not only salaries of judges, but also of employees, and the court's "expenses of operation and maintenance." Such non-salary items for the Tax Court are, of course, <u>not</u> pegged to the district courts.

We also believe it necessary to point out the constitutional controversy surrounding the status of Bankruptcy Judges and Tax

Court judges. These judges are considered Article I judges rather than Article III judges. It is Article III that gives judges life tenure and protects them against reductions in compensation. Nevertheless, this legislation in an attempt to be comprehensive in its approach, specifically included Bankruptcy Judges and such coverage may in fact turn out to be necessary.

The Supreme Court is currently considering a case that may result in a ruling that may designate Bankruptcy Judges as Article III judges. Marathon Pipeline Co. v. Northern Pipeline Co., 50 U.S.L.W. 3365 (U.S. Nov. 10, 1981)(No. 81-150). See Krattenmaker, "Article III and Judicial Independence: Why the New Bankruptcy Courts are Unconstitutional", 70 Geo.L.J. 297 (1981).

## CONCLUSION

Congress has the constitutional authority and duty to set judicial salaries and this legislation allows Congress to accomplish this directly by specific authorization. It would put an end to automatic, back-door pay raises for Federal Judges, and further allow Congress to form its own coherent budget policy for the salaries and expenses of the Federal Judiciary, including support personnel. For these reasons, the Washington Legal Foundation submits that S. 1847 is in the public interest. Thank you.

STATEMENT ON S. 1847

THE FEDERAL JUDICIAL SALARY CONTROL ACT

Prof. Kenneth M. Holland
Department of Political Science
The University of Vermont

February 25, 1982

I wish to speak in behalf of S. 1847, the Federal Judicial Salary Control Act of 1981. The bill is clearly within Congress' power to enact and, on balance, is wise policy as well. The purpose of section 4 of the bill is to exempt judges from the Executive Salary Cost-of-Living Adjustment Act of 1975, under which judges may receive cost-of-living adjustments without specific congressional authorization, and the Pay Comparability Act of 1970 and the Postal Revenue and Federal Salary Act of 1976, wherein the magnitude of judicial salary increases is determined by the executive, not legislative, branch. Section 3 of the bill would require that Congress each year authorize the operations and programs of the federal district and appeals courts, the Federal Judicial Center and the Administrative Office of the United States Courts. I shall confine my remarks, however, to section 4 and the issue of the process by which judicial compensation is established.

CONSTITUTIONAL ISSUES

Art. I, sec. 9 states that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." Art. III, sec. 1 provides that "The Judges, both of the supreme and inferior Courts . . . shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office." The Framers sought, thus, to strike a balance between legislative control over the compensation of judges

and protections for the independence of the judiciary. The assumption is that if judges are to resolve disputes impartially, they must be dependent upon neither the litigants nor the political departments of the government. Moreover, those considering accepting appointments to the bench are assured their compensation will not be diminished during their tenure. If displeased with a particular decision or series of decisions by the courts, however, Congress may withhold pay raises until these decisions are reversed. Congress may not diminish the salaries the judges are presently receiving. The withholding of salary increases, even during periods of high rates of inflation, as a form of legislative pressure upon the judiciary was explicitly acknowledged by the Framers as part of the checks and balances that maintain the equilibrium of the separation of powers.[1] The history of this particular use of the appropriations power is quite illuminating.

According to Madison's notes of the Constitutional Convention, the delegates first agreed to an arrangement under which Congress could neither increase nor decrease judicial compensation. Citing the problem posed by inflation, Gouverneur Morris persuaded a majority to strike the prohibition on increases. Madison spoke against the change, arguing that judges would tend to curry the favor of Congress when it was considering salary increases. In order to meet the contingency of inflation, Madison proposed instead an indexing system, whereby in effect judges would receive automatic cost-of-living increases without specific authorization from Congress. The Framers, however, rejected both indexing and a prohibition on increases. Increases are left completely within the discretion of Congress.[2]

---

[1]The Supreme Court has acknowledged that refusal to increase judicial compensation to keep up with inflation does not amount to a diminution of judicial salaries in violation of Art. III, sec. 1. Atkins v. U.S., 556 F.2d 1028 (1977), cert. denied, 429 U.S. 939.

[2]See 2 J. Madison, The Records of the Federal Convention of 1787, p. 45 (M. Farrand ed. 1911) and The Federalist No. 79.

3

On the basis of this debate, one must conclude that it is quite proper for Congress to use its control over increases in judicial compensation as a means of checking judicial authority. The withholding of increases, although a rather crude weapon when the aim is to urge the courts to reconsider a handful of specific decisions, belongs to the category of legislative restraints on judicial policy making, such as: the Senate's option to refuse to confirm presidential nominees to the bench; the impeachment and removal power; control over the existence of the lower federal courts and the size of the Supreme Court; control over the jurisdiction of the courts, including the appellate jurisdiction of the Supreme Court; reversal of judicial statutory constructions by legislation; and reversal of judicial constitutional interpretations by constitutional amendment. There is a tendency among contemporary commentators to overlook the number of means available to the legislative and executive branches to effect reversals of unwise or unpopular judicial policies and to ignore the fact that the draftsmen of the Constitution thought tenure during good behavior and a prohibition on decreases in compensation were adequate to safeguard judicial impartiality. The political restraints upon judicial policy making have in fact been so effective that history reveals that "Decisions [of the Supreme Court] running counter to the broad consensus simply do not last in the long run."[3]

Congress has on a number of occasions used its control over appropriations and salary increases to express dissatisfaction with specific decisions of the courts. In 1816, the House refused to pass a bill to provide for the first paid

---

[3]Henry J. Abraham, The Judicial Process, 4th ed. (New York: Oxford Univ. Press, 1980), p. 356.

court reporter. The House was reacting against Martin v. Hunter's Lessee, 1 Wheat. 304 (1816), wherein the Supreme Court established its right to review decisions of state supreme courts. Following the Court's decision in Brown v. Board of Education, 347 U.S. 483 (1954), some members of the appropriations subcommittees used the annual appearance of two Supreme Court justices to present the budgetary needs of the Court to express disfavor with the decision. The most explicit incidence of the salary-increase weapon occured in 1965. The 1964 Government Employees Salary Reform Act increased the pay of all federal judges, except Supreme Court justices, by $7,500. The justices received only a $4,500 increase. By approving the $3,000 differential, Congress clearly intended to reprimand the Court for a number of unpopular decisions of the 1950s and 1960s. Rep. Robert Dole made the congressional intent clear:

> I take this time because whenever thinking about the Supreme Court, I think of last June 15, 1964, and the reapportionment decisions handed down in Reynolds against Simms and the related cases. It has been suggested that perhaps Section 2 of this bill might be amended whereby the effective date of the pay increase, if adopted by this House, would be the date the Supreme Court reverses the decision in Reynolds against Simms.[4]

Congress undoubtedly has the power to employ salary increases to retaliate for specific decisions and the Supreme Court has no constitutional grounds on which it could object to such a use of the power.

POLICY CONSIDERATIONS

A policy of returning to Congress control over salary increases granted to the judiciary is not only consistent with the intentions of the Framers, it also has much to recommend it on the merits. In the first place, S. 1847 would remove an inequity created by the Supreme Court's decision in U.S. v. Will, 449 U.S. 200 (1980). Three times, in 1976, 1979 and 1981, Congress enacted, and the President signed into law, prohibitions on executive level federal

---

[4]Cong. Rec., March 17, 1965, p. 5126.

5

employees receiving pay increases recommended by the executive branch after October 1, the beginning of the fiscal year. Because of the Court's interpretation of Art. III, sec. 1, judges received these pay increases while no other executive level federal employee did. Justice demands that Congress remove this inequity by passing a bill such as S. 1847 which has the effect of overruling U.S. v. Will.

Secondly, encouraging the judges to engage in face-to-face lobbying of Congress is a sound policy. Historically, the executive branch has intervened between the judiciary and the legislative process. Prior to 1940, the attorney general and the Justice Department determined the judiciary's budget and lobbied Congress in behalf of the courts. Between 1940 and 1975, the judiciary made its budget requests directly to Congress. Federal district, appellate and Supreme Court judges all made regular appearances before appropriations committees. Since 1975, however, control over salaries has slipped from the appropriations committees back to the executive branch. The effect of the executive barrier between elected representatives and the judges is to reinforce judicial isolation from public opinion and thus to reduce what little public accountability the tenure and compensation guarantees of Article III permit.

A careful study of the pros and cons of a policy encouraging federal judges to appear personally before the appropriations subcommittees concluded:

> Of course, personal appearances before the subcommittees carry some risks . . . . It does dramatize the Court's dependence upon Congress for funding. Beyond that, it provides the structured opportunity for members of Congress to berate the justices on a face-to-face basis for unpopular decisions--or even to engage in fiscal retaliation against the Court.
>
> Still . . , frankly, we do not think it a bad idea for the justices to step down from the high bench, remove their robes, and cross the street, hat in hand, to seek funds from the people's representatives.[5]

A third recommendation of S. 1847 is that it contributes to a reversal

---

[5]Dean L. Yarwood and Bradley C. Canon, "On the Supreme Court's Annual Trek to the Capitol," 63 Judicature (Feb. 1980) 322, 327.

of three undesirable trends in American governmental processes. The first of these is a trend toward replacement of legislative with administrative control over judicial salaries. The evils of administrative control were dramatized during the implementation of the Economic Stabilization Act of 1970. Between August 1971 and April 1974, state legislatures could not raise the salaries of state judges without the approval of the executive branch of the federal government. Both federalism and separation-of-power issues were involved. A number of states objected strongly to this usurpation of legislative prerogative and one of them, Missouri, simply defied the law and the President's executive orders.[6] The two greatest threats to legislative control over judicial salaries today are the inclusion of cost-of-living clauses and the use of compensation commissions to set pay raises. A minority of the states and the federal government now employ these devices. A majority of the states have decided, however, that the costs in judicial isolation from the democratic process and in loss of legislative responsibility for public expenditures outweigh the benefits of an impartial, automatic device for determining judicial salaries.[7]

A second undesirable trend addressed by S. 1847 is excessive delegation by Congress of its legislative powers to the executive branch. Here we are talking about delegation of the appropriations power, arguably the most important of all legislative responsibilities. The bill also contributes to a reversal of a third, and related, development--supervision over administrative decisions by means of the legislative veto. Congress has attempted to regain some of the control it lost through excessive delegation by giving one or both houses the authority to disapprove executive decisions and regulations before they go into effect. Under the Executive Salary Cost-of-Living Adjustment Act of 1975 and

---

[6]See Kenneth M. Holland, "Federal Control of State Judicial Salaries: Constitutional and Administrative Implications." 7 Justice System Journal (1982) (forthcoming).

[7]Pat Chapin, "The Judicial Vanishing Act," 58 Judicature (Nov. 1974), 160, 163.

the Federal Pay Comparability Act of 1970 the President adjusts judicial salaries unless within 30 days either House of Congress adopts a resolution disapproving the President's proposed plan. If one House disapproves, the Department of Labor's recommendation governs. Besides encouraging Congress to enact overly general statutes and thus to over-delegate its powers, the legislative veto faces a serious constitutional challenge on separation-of-powers grounds. The issue is presently before the Supreme Court (INS v. Chadha). If the Court invalidates the legislative veto, the effect on the judicial salary question will be even less legislative involvement in the process than under the present laws. The fallacy of the 1970 and 1975 acts, of course, is that the determination of judicial salaries is essentially an executive function. The debate at the Constitutional Convention reveals that the Framers believed it was essentially a legislative function.

A final policy recommendation of The Federal Judicial Salary Control Act is that, if enacted, it would permit the Congress to teach the federal courts a lesson about the proper role of the judiciary. The decisions involving school prayer and abortion that have led to the introduction of this bill and bills to modify the jurisdiction of the courts are based on ludicrous interpretations of the 14th Amendment. In these cases the Supreme Court abandoned its proper role of giving to the words of the 14th Amendment a meaning consistent with their plain meaning and the intention of their framers and has engaged in the most egregious acts of constitutional amendment by judicial fiat. If judicial salaries are not increased while these decisions stand, the judges have only themselves to blame.

## RESPONSE TO THE BILL'S CRITICS

What are the major criticisms of subjecting judicial salaries to the annual appropriations' process and what is the proper response to them? It is argued that putting the judges' salaries at the mercy of Congress, especially

during inflationary periods, will impair the independence of the courts. Judicial independence, however, is sufficiently safeguarded by tenure during good behavior and a ban on diminution of judicial salaries. The bill certainly does not give Congress any direct power over the content of particular decisions.

A very common criticism of tampering with a system of automatic cost-of-living increases and quadrennial recommendations of salary increases by experts not accountable to the public is that without the substantial annual increases that such a system is likely to provide, the federal government will be unable to retain the most capable sitting justices or to attract the most qualified persons to serve on the bench. Several supporters of the Executive Salary Cost-of-Living Adjustment Act during the congressional debate in 1975 cited as a motivation behind the bill Chief Justice Burger's assertion that the disparity between what the best lawyers were earning in private practice and judicial salaries was attracting federal judges to private employment and was preventing the best candidates from accepting judicial appointments. The bill in fact emerged from a meeting of congressional leaders, President Ford and Chief Justice Burger in the White House on March 10, 1975.[8] The Chief Justice has publicly made this argument for automatic pay raises determined by the executive branch on numerous occasions. The argument that the disparity between what partners earn in large law firms and what rederal judges earn has made judicial service unattractive to those most fit to perform the duties of a judge is, however, unpersuasive. The contention is essentially an empirical one. The only way to test the Chief Justice's hypothesis is to conduct a controlled experiment. The evidence cited by the adherents of this view is impressionistic, non-scientific and self-serving. No social scientist would accept the following data as confirmation of a hypothesis:

> The inequity of failure to provide any increase in pay for federal judges for almost six years is perhaps felt most extensively in the district courts,

---

[8] 1975 Congressional Quarterly Almanac, pp. 703-708.

9

where six judges have resigned in the last thirteen months to return to private or corporate practice. That was as many resignations for such reasons in little more than one year as in the previous thirty-four years.

The federal courts will continue to lose judges and fail to attract many promising young attorneys who must be the mainstays of an effective judicial system, and the nation will suffer for it.[9]

Besides having no empirical support, the hypothesis runs counter to common sense. The Chief Justice's figures show that very few judges have actually left the bench for financial reasons. Moreover, why should we assume that the skills associated with a successful corporate law practice are the skills associated with judging cases? The evidence is that the more successful an attorney is in a large law firm the less time he spends in court. The most prestigious lawyers, as a rule, have very little trial experience. Judging is essentially a scholarly activity. Several state constitutions, for example, require that judges be men "learned in the law." As the compensation policies of our universities plainly show, however, the best scholars can be attracted to institutions by salaries one-fourth to one-third those currently being earned by federal appellate judges. In short, the argument that insulation of judicial compensation from the political process and automatic cost-of-living raises are necessary to maintain the quality of the federal judiciary is specious.

Finally, forcing the judges to subject themselves to the annual appropriations process will in no way impair either the efficiency of the courts or their accessibility to unpopular litigants. If Congress wishes to drive certain classes of litigants from the federal courts, it cannot do so directly but only indirectly by eliminating from substantive legislation certain causes of action or by abolishing jurisdiction over certain kinds of cases. S. 1847, however, would have no effect, direct or indirect, on litigant accessibility to the courts.

In fine, a policy of direct legislative control over judicial salaries has much to recommend it.

---

[9] "Chief Justice Burger Calls for Action on Several Proposals," 61 American Bar Association Journal (March 1975) 303, 304.

SUPPLEMENT TO STATEMENT

OF

PROF. KENNETH M. HOLLAND

THE UNIVERSITY OF VERMONT

ON S. 1847

THE FEDERAL JUDICIAL SALARY CONTROL ACT

I wish to thank the Subcommittees on Agency Administration and on Courts for permission to supplement my written statement and oral testimony. In the first place, I wish to address the constitutional and policy issues raised by section 3 of S. 1847. Section 3 would require that Congress annually authorize the operations and programs of the federal judiciary (with the exception of the Supreme Court). During the hearing the question was raised whether Congress could, consistent with the Constitution, refuse to reauthorize the federal district and appeals courts. The answer is a clear yes. A decision by Congress, in effect, to abolish the district courts, for example, is completely within its power and would override all rights of litigants involved in pending cases. There is no individual constitutional right to have one's case heard and decided in a federal trial court. Art. I, sec. 8 provides that "the Congress shall have power . . . to constitute tribunals inferior to the Supreme Court." Note that there is no duty to constitute such tribunals any more than there is a duty "to declare war" (Art. I, sec. 8). Art. III, sec. 1 states that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish" (emphasis added). Congress, thus, may choose not to establish federal trial and intermediate appellate courts, leaving litigants with federal questions no choice of forum but state courts (this is the situation in the Canadian and other federal systems).

The Supreme Court would continue to operate as an appellate court and a court of original jurisdiction in cases involving ambassadors and between states. All appeals would come from state courts, however. The Supreme Court could certainly operate without federal lower courts. Reversals and remands would be limited to cases that originated in the state courts. The state courts are, in fact, capable of processing the caseload of the U. S. District Courts. This is made clear by the current discussion over abolishing diversity jurisdiction. The state judiciary has stated, through its chief justices association and the National Center for State Courts, that it can handle large numbers of cases now heard in federal court.

Congress could, by refusing to reauthorize federal trial courts, abolish district judgeships without violating the Constitution's guarantee of life tenure. For example, Congress in the Judiciary Act of 1801 (2 Stat. 89) created six circuit courts of appeals and 16 resident circuit judgeships. The next year, however, Congress in the Circuit Court Act of 1802 (2 Stat. 132) repealed the 1801 Judiciary Act, thus removing the 16 circuit judges from the bench. This removal was validated by the Supreme Court in Stuart v. Laird, 1 Cranch 299 (1803).

This episode indicates that Congress may use its power to dismantle federal courts in order to express dissatisfaction with the philosophy of the incumbent judges. Under the Judiciary Act of 1801, Pres. Adams nominated and a Federalist Senate confirmed 16 Federalist circuit judges. The 1802 repeal statute was enacted by a Congress dominated by Republicans and signed by Pres. Jefferson, who justified the repeal by saying: "The Federalists have retired into the Judiciary as a stronghold . . . and from that battery all the works of republicanism are to be beaten down and erased."[1] It would be

---

[1]Quoted by Charles Warren, The Supreme Court in United States History, vol. 1 (Boston: Little, Brown, 1926), p. 201.

proper for Congress to consider the judges' approach to the Constitution during the authorization process. The Congress need not confine itself to judicial housekeeping policies and practices.

Congress, of course, can not abolish the Supreme Court, so S. 1847's exemption of the High Court from the annual reauthorization process is appropriate.

Besides being constitutional, annual reauthorization hearings could produce positive benefits. One benefit would be the involvement of experts other than lawyers and judges in the process of formulating programs for the judiciary. The present legal system is not meeting the needs of the public for the just, speedy and inexpensive resolution of legal disputes, as promised by the federal rules of civil and criminal procedure.[2] The legal and judicial professions have a vested interest in perpetuating the existing system. This leads to one solution for delay and congestion in the courts--more judges. Social scientists, on the other hand, have studied the courts and have recommended alternatives (e.g., Art. I tribunals, administrative procedures, neighborhood justice centers, ombudsmen, mediation and arbitration services, and diversion programs) for the settlement of conflicts. Social scientists with innovative ideas are likely to receive a more sympathetic hearing before congressional committees than before the judiciary, which under the present law formulates its own budget without substantial participation by experts who do not belong to the legal fraternity.

Another consideration favorable to the bill is that in a democracy policy makers ought to be accountable to the people. A policy may be defined as a general rule designed to influence the behavior of large numbers of persons in the future. The federal courts do not confine themselves to resolving disputes between litigants and to enforcing and interpreting the law

---

[2]Kenneth M. Holland, "The Federal Rules of Civil Procedure: A Policy Evaluation," 3 Law & Policy Quarterly (April 1981) 209.

but do regularly engage in policy formulation. As long as judges exercise legislative power, the public has a right and a duty to treat them as legislators, i.e., to hold them accountable for their policy choices.

One must constantly keep in mind that the Constitution is not what the judges say it is. Presidents Jefferson, Jackson and Lincoln all took the position that the Congress and the President had a duty to interpret the Constitution independently of the Supreme Court. The Court's reading, they believed, was only binding as to the parties in the particular dispute where the constitutional issue was raised. It is not binding, they argued, upon the executive and legislative branches as a matter of general policy. Lincoln in his First Inaugural warned that

> the candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties in personal actions the people will have ceased to be their own rulers, having to that extent practically resigned the government into the hands of that eminent tribunal.

S. 1847 will not affect judicial impartiality in individual cases. Tenure during good behavior and a ban on judicial salary reductions are sufficient to guarantee to litigants an impartial decisionmaker.

In conclusion, I wish to state that the major benefit of this bill is a reassertion of legislative control over the organization and operation of the judiciary and, thus, can be compared favorably with the War Powers Resolution of 1973 (87 Stat. 555). In this resolution, passed over the President's veto, Congress reasserted its power to declare war, a power that it had permitted the executive branch to usurp.

The bill is not well designed to affect particular decisions. The jurisdiction-stripping and remedy-stripping bills currently before the Senate are better designed to achieve the purpose of nullifying particular

cases. Conservative Congressmen, moreover, should consider that the use of the authorization or salary weapon against the courts may backfire in the future. The Supreme Court may one day be dominated by conservatives while the Congress is dominated by liberals. S. 1847 would then be a precedent for legislative retaliation against the judiciary. Witness the conflict between the anti-slavery Lincoln administration and the pro-slavery Taney Court and the pro-government regulation Roosevelt administration and the anti-government regulation Hughes Court. The present administration, of course, is nominating and seeking conservative candidates for the bench. These conservatives, who share the President's view of the role of the courts in the American democracy, may refuse to accept positions on the federal bench if there is little hope of a salary increase until the Supreme Court reverses its position on school prayer, abortion and bussing. On balance, however, S. 1847 represents a healthful reassertion of legislative power over the judiciary.

STATEMENT OF EDWARD H. DOWD
DIRECTOR OF RESEARCH, NATIONAL
LEGAL CENTER FOR THE PUBLIC INTEREST

My name is Edward H. Dowd. I am Director of Research for the National Legal Center for the Public Interest. The Center is a 501(c)(3) public interest legal center with a special interest in the judiciary and the judicial process. In 1977 we sponsored a conference on the role of the judiciary in a democratic society during which attention was paid for perhaps the first time in what is now known as judicial activism. The principal papers from the conference were published in a book of the same title. Among our current publications is the JUDICIAL/LEGISLATIVE WATCH REPORT, which is distributed free of charge every 10 days or so. It reports on pending legislation and Congressional action which affects or may affect the judiciary and the judicial process. It also lists the federal bench vacancies and nominees. I thank the Subcommittees and their Chairmen Senator Dole and Senator Grassley, for this opportunity to contribute to the Subcommittees' deliberations on S. 1847, the Federal Judicial Salary Control Act of 1981.

The rules and practices of the Senate and the House concerning authorization and appropriation bills, to someone not involved with them on a continuing basis, are far from clear. Consequently, we will try to limit our remarks to the policy of subjecting the money needs and fiscal efficiency of the judicial branch to Congressional scrutiny via appropriations hearings and legislation.

In our opinion, the general thrust of S. 1847 serves the public interest by opening up to a greater degree the details of the funding of the judicial branch. It further serves the public interest by re-affirming the legislature's role under the Constitution with respect to the expenditure of public funds.

We will comment on this and other reasons why we support the intent of S. 1847 as well as two possible problems this legislation might present.

INTRODUCTION

As Senator Helms said when introducing this bill, it provides a balanced means for legislative committees and Congress as a whole periodically to define budgetary objectives for the judiciary. Under its provisions Congress will be able to specify a desired level of funding instead of hastily rushing to amend figures furnished by another branch of the Government.

Although the legislation is called the Federal Judicial Salary Control Act of 1981 its scope is not limited to controlling the salaries of federal judges and justices. It actually applies to the financial needs of the federal judiciary to operate the court system as well as to the determination of judges' salaries.

Thus, Section 3 makes the courts of appeal, the district courts, the Federal Judicial Center, the Administrative Office of the United States Courts, the U.S. magistrates, jurors and commissioners, the federal public defender organizations, attorneys appointed to represent persons under the Criminal Justice Act of 1964, bankruptcy courts, the U.S. Court of International Trade, Court of Customs and Patent Appeals and Court of Customs, subject to Congress' annual appropriation process.

This means that not only must Congress authorize the operation of the federal court system but it must scrutinze the individual components of that system and then specifically appropriate money for it.

Such a process enables Congress to exercise oversight functions but also permits Congress to more easily fit the financial needs and appropriations into its overall budget and spending programs. On this ground alone we would most likely support S. 1847.

However, we support the bill for other reasons which are primarily based on our interpretation of the constitution and the public interest.

ARGUMENTS IN SUPPORT

Section 3

As we all know, the constitution established three branches of government, Legislative, Executive and Judicial, which, while charged with differing responsibilities, are co-equal.

Many voices are now heard proclaiming the conviction that one of the three branches is becoming more equal than the other two, and that branch is the judicial branch.

The reasons for this view may be many but the principal reasons appear to be:

-Judges are appointed for life and are not therefore answerable to the electorate;

-the authority of the Supreme Court to rule acts of Congress unconstitutional and,

-the spread of judicial activism and the claimed willingness of judges to legislate rather than interpret existing law.

Without debating the merits and demerits of that view, it appears to us that Section 3 of S. 1847 re-affirms the co-equal status of Congress vis-a-vis the judicial branch. In a sense, Section 3 denies the supremacy of the judicial branch by making its finacial requests subject to annual approval by Congress, i.e., the elected representatives of the people.

The legislation also confirms Congress' role in meeting its responsibility under the constitution to authorize and appropriate public monies.

To the extent the judicial branch is co-equal with the other branches of government, it should be equally responsible and accountable for its use of tax dollars. Just as the departments of the executive branch must go to Congress and explain their programs and financial needs and justify them publicly, so too should the judicial branch.

In the public's mind, there is no valid distinction between the Department of Agriculture asking for money to hire more people or to acquire a computer and the judicial branch seeking to hire more people or to computerize its records. If one is required to appear publicly to answer questions why should not the other.

Judges, being appointed for life, are not directly answerable to the public for their actions as judges, and this is what we want and what we defend. Judicial independence is considered to be a necessity in a democracy such as ours. Nevertheless, this untouchable status of the judiciary may create problems in public acceptance of unpopular decisions and may contribute to a loss of respect for the judiciary.

This negative aspect of judicial independence can be at least partially offset by requiring judges and others representing the judicial branch to appear publicly before Congressional committees to explain and justify their requests for moneys.

The exclusion of the Supreme Court from this requirement may be questioned but we tend to agree with the explanation given by Senator Helms for excluding it.

Section 4

This Section is concerned with the issue of salary increases for judges of both the Supreme Court and the inferior courts of the United States.

By requiring specific authorization and appropriation for judicial salary increases, the legislation establishes the equality of judges with other federal employees and office holders.

The legislation by so doing also reanders salary increases somewhat more acceptable to the public because the matter has most likely been reported on in the media and the public is more aware of the need for any eventual increases.

These are valid reasons for supporting the legislation, but we believe there are two more significant reasons. First, the requirement for a separate Act of Congress authorizing increases forces Congress to act in a positive, constructive manner rather than in a negative manner. In the first, instance, Congress will have had an opportunity to consider and justification for an increase and will have been able to do so in relation to the overall financial needs of the government. In the second instance, Congress may be compelled

to interrupt other deliberations so as to "beat the clock." Congress might therefore vote against increases simply out of a sense of frustration due to the impending deadline rather than for thoughtful reasons.

Second, the provisions of S. 1847 avoid placing the court in a position of apparent conflict of interest by requiring it to decide whether Congress acted within the proper time and, hence, whether the salary increase is legal and effective.
The court should welcome this.

ARGUMENT IN OPPOSITIONS

Although we support S. 1847, we recognize certain fears may be expressed which would lead some people to oppose the legislation.

One such argument is that subjecting the judiciary to Congressional oversight would inevitably impinge upon the independence of the judiciary. This argument suggests that during hearings on the judiciary's requests a Senator or Representative will inquire into the reasons why courts accept certain cases and why they decide as they do. The argument also suggests Congress will punish the courts for some of their decisions.

This argument appears to us to be of the "what if" variety and, while difficult to answer with certainty, lacks sufficient basis in fact or experience to be accorded any weight.

From our limited reading in this area, it is our belief that such intrusive questions have not arisen during authorization hearings in the House of Representatives. Thus, there is no reason to suppose they will during appropriations hearings. See Yarwood and Cannon, "On the Supreme Court's annual trek to the Capitol," 63 Judicature 322 (1980) wherein Justice Burton is quoted as being glad the justices could come before the subcommittees rather than being represented by the Department of Justice.
It must be remembered that Congress respects the judiciary, and should improper questions be posed by an individual member of a committee, they

would be either overruled by the chairman or the representative of the judicial branch would properly decline to answer them.
Should, however, the possibility of this occurring be considered serious, it is suggested that S. 1847 be amended to exclude questions pertaining to actions of the judiciary when its acts in a judicial capacity, that is, when selecting cases and deciding cases. Whenever the judicial branch acts as administrator, employer, employee or in some other non-judicial capacity the Congress would be entitled to ask any questions it feels are necessary.

Section 3 does, however, pose a potentially more serious problem. The salaries of federal office holders, including federal judges, may not be reduced during their time in office.

Pursuant to Section 3, appropriations for the payment of judicial salaries are limited to one year and can be renewed only as specifically authorized by an Act of Congress.

Congress has in the past missed deadlines for appropriations legislation due to unanticipated events which disrupt Congressional schedules and timetables. A recent example is when the government was partially shut-down for lack of funds in October 1981.
Had S. 1847 been in effect at that time the federal judges presumably would not have received any salary. In effect, they would have suffered a reduction in salaryin violation of the Constitution.

We would then be faced with individual judges bringing successful mandamus actions against the Secretary of the Treasury for payment of their salaries.

Payment of Congressionally approved salaries to judges is of no concern to Congress. Therefore, it would be advantageous to all if the foregoing problem could be avoided. While there may be other satisfactory ways to do so, one means might be to simply delete the words "of judges" from line 3 of Section 3.

The question of salary increases would continue to be subject to Section 4, which does not present the same problem since salary increases are not constitutionally protected.

CONCLUSION

In brief, the National Legal Center for the Public Interest supports the intent of S. 1847, the Federal Judicial Salaries Control Act of 1981. The Act reaffirms the co-equal status of the legislative and judicial branches; it reinforces Congress' role in overseeing the expenditure of federal monies; it enables the public to learn more about the workings of the judicial branch; it permits Congress to approach the issue of judicial salaries in a thoughtful, coherent manner, and it frees the court from a possible conflict of interest whenever it is called upon to decide whether its salaries have been legally and effectively increased.

Senator GRASSLEY. Thank you all very much. The hearing is adjourned.

[Whereupon, at 11:29 a.m., the subcommittees recessed, to reconvene at the call of the Chair.]

# APPENDIX

## PROPOSED LEGISLATION

97TH CONGRESS
1ST SESSION

# S. 1847

To require an annual authorization for the Federal court system excluding the Supreme Court.

---

IN THE SENATE OF THE UNITED STATES

NOVEMBER 12 (legislative day, NOVEMBER 2), 1981

Mr. HELMS introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

# A BILL

To require an annual authorization for the Federal court system excluding the Supreme Court.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That this Act may be cited as the "Federal Judicial Salary Control Act of 1981".

SEC. 2. For purposes of this Act, the term "Federal judiciary" includes—

(1) the courts of appeals, the district courts constituted by chapter 5 of title 28, United States Code, including the Court of Claims, the District Court of

Guam, the District Court of the Virgin Islands, the Court of Customs and Patent Appeals, and the Court of Customs;

(2) United States magistrates;

(3) jurors and commissioners;

(4) the Federal public defender and community defender organizations and attorneys appointed to represent persons under the Criminal Justice Act of 1964;

(5) bankruptcy courts;

(6) the Federal Judicial Center;

(7) the Administrative Office of the United States Courts; and

(8) the United States Court of International Trade.

SEC. 3. Notwithstanding any other provision of law, no appropriation may be made for the Federal judiciary, including the payment of salaries of judges and employees and the expenses of operation and maintenance, for any fiscal year beginning on or after October 1, 1982, except as specifically authorized by an Act of Congress with respect to such fiscal year.

SEC. 4. Notwithstanding any other provision of law, judges, both of the Supreme and inferior Courts of the United States, shall receive, for their services, no increase in compensation during their continuance in office, or during their

retirement therefrom, except as may hereafter be specifically provided by separate Act of Congress authorizing such increase and stating the amount thereof.

91-266 O - 82 - 11

ADDITIONAL SUBMISSIONS

Congressional Research Service
The Library of Congress

Washington, D.C. 20540

# TELEPHONE SURVEY OF STATE COURT ADMINISTRATION OFFICIALS REGARDING AUTHORIZATION OF THE STATE JUDICIAL BUDGET AND THE METHOD USED TO PROVIDE FOR JUDICIAL SALARY INCREASES

Dana Ely
Legislative Research Assistant
American Law Division
February 23, 1982

The results of a telephone survey of state court administration officials who were asked if there was another committee besides the state appropriations committee which authorized money for the state judicial system are as follows: 48 states replied negatively saying a judiciary committee could deal with enabling legislation for judicial matters but it was the appropriations committee which authorized the state judicial budget. Only in Tennessee did the state judiciary committee exert equal control over the state judicial budget. West Virginia has a constitutional provision prohibiting any legislative action to decrease the judicial budget. [Constitution of West Virginia, Art 6, Sec. 51(5)].

Regarding the question of judicial salary increases the fifty states can be divided into four categories with Tennessee standing alone as the only state which bases its judicial salary increases on changes in the United States Consumer Price Index.

The largest group, twenty-nine in all, raise judicial salaries by statutory act. Either in the form of an item in the budget or a separate salary bill, the state legislatures of Arkansas, Connecticut, Delaware, Hawaii, Idaho, Indiana, Maine, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Mexico, Nevada, North Dakota, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Texas, Vermont, Virginia, West Virginia, Wisconsin and Wyoming all retain complete control over judicial salaries.

The second group consists of thirteen states which have formed judicial compensation commissions to make advisory recommendations concerning judicial salaries. The legislatures still retain control to act when and how they wish. These states are: Arizona, Colorado, Florida, Georgia, Illinois, Iowa Kentucky, Louisiana, Montana, New York, South Dakota, Utah and Washington.

There are four states--Alabama, Maryland, Michigan and Rhode Island--which have judicial compensation commissions which have the power to force the legislature to act.

Lastly there are four states--(Alaska, California, Kansas and Maryland)--where increases in judicial salaries are tied to increases in the salaries of state employees.

ALABAMA

Bob Tillman
Dept. of Court Management
Montgomery
Alabama 36104
205-832-6710

Alabama has a Judicial Compensation Commission which proposes judicial salary increases. The increases are automatic at the end of the legislative session if they are not acted upon by the legislature. Ala. Const. Amendment No. 328, Sec. 6.09; Ala. Code Sec. 12-10-1 to 5

ALASKA

Arthur H. Snowden II
Administrative Director
of Courts
303 K Street
Anchorage, Alaska
907-274-8611

By Chapter 3, 1980 session laws, judicial salaries are tied to the salaries of executive state employees.

ARIZONA

Bill McDonald
Court Administration
West Wing, State Capitol
Phoenix, Arizona 85007
602-255-4359

Arizona has a Commission on Salaries for Elective State Officers. The recommendations they make apply to the judiciary, are submitted to the Governor but the Governor submits his own recommendations which become effective if the legislature does not act on them within 90 days. Ariz. Const. Art. 5, Sec. 13, Ariz. Rev. Stat. Sec. 14-1902 to 1904.

ARKANSAS

Jack Jarrett
Supreme Court
Justice Bldg.
Little Rock, Arkansas 72201
501-371-2295

Arkansas raises judges' salaries by statutory acts of the legislature.

CALIFORNIA

Ralph J. Campbell
Administrative Office
of the Courts
Judicial Council
455 Golden Gate Ave.
San Francisco
California 94102
415-557-1581

California judicial salaries are tied to salary increases for state employees Calif. Government Code, Sect. 68203.

COLORADO

Marianne Motza
State Court Administrator's
Office
Rm. 215, Colorado
State Judicial Bldg.
1 E Fourteenth Avenue
Denver, Colorado 80203
303-861-1111

Colorado raises judges' salaries by statutory acts of the legislature. The Colorado State Officials Compensation Commission makes recommendations which apply to the judiciary but they are advisory only. Colo. Rev. Stat. Sec. 2-3-801 to 806.

CONNECTICUT

Virginia Jones
Court Administration
Drawer N, Station A
Hartford
Connecticut 06106
203-566-4461

Connecticut raises judges' salaries by statutory acts of the legislature. A bill was passed in 1978, raising salaries incrementally to 1983.

DELAWARE

Lowell Groundland
Administrative Office
of the Courts
Delaware Court System
1112 King Street
Wilmington
Delaware 19801
302-571-2480

Delaware raises judges' salaries by statutory acts of the legislature, usually as part of the budget bill.

FLORIDA

Pete Rokeski
Court Administration
Supreme Court Bldg.
Tallahassee
Florida 32304
904-488-8621

Florida raises judges' salaries by statutory acts of the legislature. The State Officer's Compensation Commission makes recommendations which apply to the judiciary but they are advisory only. Fla. Stat. Ann. Sec. 112.192.

GEORGIA

Ken Kincaid
Assistant Director
Administrative Office
of the Courts
84 Peachtree St., #500
Atlanta, Georgia 30303
404-656-5171

Georgia raises judges' salaries by statutory acts of the legislature. The State Commission on Compensation makes recommendations which apply to the Judiciary but they are advisory only. Ga. Code Ann. Sec. 89-716 to 722.

HAWAII

Jeff Egeder
Judiciary Branch
417 S. King Street
Honolulu
Hawaii 96813
808-548-4605

Hawaii raises judges' salaries by statutory acts of the legislature.

IDAHO

Carroll Ross
Administrative Office of
the Court
451 W. State Street
Boise, Idaho 83720
208-384-2246

Idaho raises judges' salaries by statutory acts of the legislature.

ILLINOIS

Mrs. Meeks
Administrative Office of
the Courts
118 W. Edwards
Springfield
Illinois 62706
217-782-7770

Illinois raises judges' salaries by statutory acts of the legislature. The Commission on Compensation of State and Local Government Officials makes recommendations which apply to the judiciary but they are advisory only. Ill. Ann. Stat. Ch. 127, Section 551 to 556.

INDIANA

Bruce A. Kotzan
Exec. Director
State Court Administration
323 State House
Indianapolis
Indiana 46204
317-232-2542

Indiana raises judges' salaries by statutory acts of the legislature.

IOWA

Charlotte Munson
Court Administration
State House
Des Moines
Iowa 50319
515-281-5241

Iowa raises judges' salaries by statutory acts of the legislature. The Commission on Compensation, Expenses, and Salaries for Elected State Officials makes recommendations which apply to the Judiciary but they are basically advisory. Iowa Code Ann., Sec. 2 A.1 to 5

KANSAS

R. G. Henley
Judicial Administration
Supreme Court
Judicial Center
Topeka
Kansas 66612
913-296-2256

Kansas judicial salaries are tied to salary increases for state employees. Kansas Stat. Ann. 75-31201

KENTUCKY

John Kilkenny
Administrative Office of
the Courts
403 Wapping St.
Frankfort
Kentucky 40601
502-564-7486

Kentucky raises judges' salaries by statutory acts of the legislature. The Public Officials Compensation Commission makes recommendations which apply to the judiciary but they are basically advisory. Ky. Rev. Stat. Sec. 64.741 745

LOUISIANA

Dr. Hugh Collins
Judicial Council of Supreme
Court
301 Loyola Ave.
New Orleans
Louisiana 70112
504-568-5747

Louisiana raises judges' salaries by statutory acts of the legislature. The Compensation Review Commission exists on paper to make advisory recommendations which apply to judicial salaries but has not met in a number of years. La. Stat., Sec. 42: 1401 to 1405.

MAINE

Bob Poulin
Administrative Office of
the Courts
Portland, Maine
207-775-1500

Maine raises judges salaries by statutory acts of the legislature.

MARYLAND

William H. Adkins
Court Administrator
Administrative Office of
the Courts
Court of Appeals
Rowe Blvd.
Annapolis
Maryland 21401
301-269-2141

Maryland judicial salaries are tied to salary increases for state employees. Maryland Code, Courts and Judicial Proceedings, Sec. 10703(b). A Judicial Compensation Commission also exists which proposes salary increases at least every four years which must be acted upon by the legislature within 50 days. Maryland Code, Courts and Judicial Proceedings, Sec. 1-708.

MASSACHUSETTS

Barbara Nelson
Supreme Judicial Court
New Court House
Boston
Massachusetts 02108
617-725-8083

Massachusetts raises judges' salaries by statutory acts of the legislature.

MICHIGAN

Carlyn Stell
Court Administration
Supreme Court
200 Washington Square N.
P. O. Box 30048
Lansing
Michigan 48909
517-373-0130

The State Officers Compensation Commission proposes salary increases which apply to Supreme Court Justice only. The recommendations become effective unless rejected by a two-thirds vote of members in each house. Mich. Const. Art. 4, Sec. 12, Mich. Comp. Laws Ann. Sec. 15.211 to 218. The salaries of lower court judges are tied directly or indrectly to the salaries of the justices of the Supreme Court. Mich. Comp. Laws Ann. Sec. 600.8202, 600.821, 600.555.

MINNESOTA

Judith L. Rehak
Court Administrator
Supreme Court
317 E State Capitol
St. Paul
Minnesota 55155
612-296-6822

Minnesota raises judges' salaries by statutory acts of the legislature.

MISSISSIPPI

Martin McLendon
Exec. Assistant
Supreme Court
Gartin Justice Bldg.
P.O. Box 117
Jackson
Mississippi 39205

Mississippi raises judges' salaries by statutory acts of the legislature.

MISSOURI

Bill Abrahms
Courts Administration
Supreme Court Bldg.
P.O. Box 150
Jefferson City
Missouri 65101
314-751-4377

Missouri raises judges' salaries by statutory acts of the legislature.

MONTANA

Michael Abley
Court Administrator
Supreme Court
Rm. 300, State Capitol
Helena
Montana 59601
406-449-2626

Montana raises judges' salaries by statutory acts of the legislature. The Montana Salary Commission makes recommendations which apply to the judiciary but they are basically advisory. Mont. Const., Art XIII, sec. 59-1401 to 1404.

NEBRASKA

Mary Kuzelewicz
Court Administration
Supreme Court
2412 State Capitol
Lincoln
Nebraska 68509
402-471-2643

Nebraska raises judges' salaries by statutory acts of the legislature.

NEVADA

Harry Lipparelli
Administrative Office of
the Courts
Capitol Complex
Carson City
Nevada 89710
702-885-5076

Nevada raises judges' salaries by statutory acts of the legislature.

NEW HAMPSHIRE

Harold Ryea
Court Administration
Supreme Court Bldg.
Concord
New Hampshire 03301
603-271-2521

New Hampshire raises judges' salaries by statutory acts of the legislature.

NEW JERSEY

Kathy Arnone
Administrative Office of
the Courts
State House Annex
Trenton
New Jersey 08625
609-292-9580

New Jersey raises judges' salaries by statutory acts of the legislature.

NEW MEXICO

Steve Urist
Court Administration
Supreme Court Bldg.
Santa Fe
New Mexico 87503
505-827-2771

New Mexico raises judges' salaries by statutory acts of the legislature.

NEW YORK

Joseph DeChants
Office of Court Administration
Albanay, New York
518-474-8172

New York raises judges' salaries by statutory acts of the legislature. The Commission on Legislative and Judicial Salaries makes recommendations which are basically advisory. N.Y. Exec. Law, Art. 27-A, sec. 815

OHIO

Doug Summerlott
Court Administration
Supreme Court
3rd Fl., 30 E. Broad St.
Columbus
Ohio 43215
614-466-2653

Ohio raises judges' salaries by statutory acts of the legislature.

OKLAHOMA

Helen Beatty
Finance Officer
Supreme Court
1 State Capitol
Oklahoma City
Oklahoma
405-521-3840

Oklahoma raises judges' salaries by statutory acts of the legislature.

OREGON

Chuck Gleason
Court Administration
Supreme Court
Supreme Court Bldg.
Salem
Oregon 97310
503-378-6046

Oregon raises judges' salaries by statutory acts of the legislature.

PENNSYLVANIA

Grenville Hays
Administrative Office of
the Courts
Supreme Court
1414 Three Penn Center Plaza
Philadelphia
Pennsylvania 19102
215-496-4527

Pennsylvania raises judges' salaries by statutory acts of the legislature.

RHODE ISLAND

Walter J. Kane
Clerk of Supreme Court
Court Administrator
Supreme Court
250 Benefit St.
Providence
Rhode Island 02903
401-277-3263

RHODE ISLAND (cont.)

Rhode Island has an Unclassified Pay Plan Board which proposes judicial salary increases which become effective after thirty days unless rejected by concurrent action of the House and Senate. Gen. Laws Rhode Island, Sec. 36-4-16.4. Rhode Island Regulations also provide longevity increases.

SOUTH CAROLINA

Mott Talley
Court Administration
7097 Bankers Trust Towers
Box 11788
Columbia
South Carolina 29211
803-758-2961

South carolina raises judges' salaries by statutory acts of the legislature.

SOUTH DAKOTA

Mark Geddes
Court Administrator
Supreme Court
State Capitol
Pierre
South Dakota 57501
605-773-3474

South Dakota raises judges' salaries by statutory acts of the legislature. The Commission on Salaries for Elective State Officials makes recommendations which are basically advisory.

TENNESSEE

Evelyn Myers
Court Administration
422 Supreme Court Bldg.
Nashville
Tennessee 37219
615-741-2687

Tennessee bases its judicial salary increases on changes in the United States Consumer Price Index. Tenn. Code Ann 8-2303.

TEXAS

Drew Dhigpen
Judicial Council
P.O. Box 12066
Austin
Texas 78711
512-475-2421

Texas raises judges' salaries by statutory acts of the legislature.

WISCONSIN

Ken Timpel
Court Adminstration
Rm. 213 NE, State Capitol
Madison
Wisconsin 537-2
608-266-6828

Wisconsin raises judges' salaries by statutory acts of the legislature.

WYOMING

Robert Duncan
Court Coordinator
Supreme Court Bldg.
Cheyenne
Wyoming 82002
307-777-7581

Wyoming raises judges' salaries by statutory acts of the legislature.

Dana Ely

Dana Ely
Legislative Research Assistant

AMERICAN BAR ASSOCIATION

OFFICE OF THE PRESIDENT
DAVID R. BRINK
AMERICAN BAR CENTER
CHICAGO, ILLINOIS 60637
TELEPHONE: 312 / 947-4042

PLEASE REPLY TO:
2200 FIRST BANK PLACE EAST
MINNEAPOLIS, MINNESOTA 55402
TELEPHONE: 612 / 340-2704

February 17, 1982

The Honorable Robert Dole
Chairman, Subcommittee on Courts
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Charles E. Grassley
Chairman, Subcommittee on
Agency Administration
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Dole and Senator Grassley:

Thank you for your invitation to the American Bar Association to testify on February 25, 1982, at the joint hearing of the Subcommittee on Courts and the Subcommittee on Agency Administration on S.1847, the Federal Judicial Salary Control Act. I would ordinarily respond eagerly to such an invitation.

However, the issues raised in this proposal -- subjecting the federal judiciary to an annual authorization and barring all increases in judicial pay or retirement benefits unless specifically authorized by Congress -- are complex and are currently under study within the ABA. We would welcome an opportunity to present our views on the proposal, but until the Association has adopted its official policy with respect to these issues, it will not be possible for us to testify, at least at this time.

Although I cannot now represent the final views of the Association, permit me to state some of the kinds of concern that seem to me personally to warrant extreme caution with respect to the major provisions of S.1847. From a very preliminary perusal, it is clear that, if enacted in its present form, the legislation presents at least one topic that is the subject of much concern in the Administration,

in the Congress and in our Association -- the separation of powers. All of us are considering the numerous statements being made today that the judicial branch is invading the province of the executive or legislative branches and that the legislative is invading that of the judicial. Seen in that constitutional context, it is evident that S.1847 could have far-reaching and potentially damaging effects on the judicial branch. This is particularly true of the annual authorization requirement which, at first glance, threatens the constitutionally assigned role of the Supreme Court and the independence, salary and tenure guarantees of Article III to all federal judges appointed under that Article. It could also be a factor in the appointment of Article III judges. Thus, it may invade the province of both the judicial and the executive branches as defined in the Constitution.

I am also concerned, because of the Association's policy in favor of adequate salaries for federal judges, about the establishment of procedures which could make it even more difficult to secure promptly reasonable compensation to the members of the federal judiciary. In addition, there may be a possible conflict between the proposal and the provisions of the Executive Salary Cost of Living Adjustment Act of 1975 and the Pay Comparability Act of 1970.

These preliminary considerations do, I believe, illustrate the complexity of the questions raised and the need for very deliberate study in Congress as well as by our Association. We will apply ourselves to the questions and communicate our conclusions when we have had an opportunity to form them. In the meantime, I hope that no precipitous action will be taken on this legislation and that we will have the opportunity to provide you with our views later in the year.

Sincerely yours,

David R. Brink

David R. Brink

DRB:sh

NATIONAL
LEGAL CENTER
FOR THE
PUBLIC INTEREST

1101 17th STREET, N.W.
SUITE 810
WASHINGTON, D.C. 20036 202/296-1683

Senator Charles E. Grassley
232 Russell SOB
Washington, DC 20510

March 5, 1982

Dear Senator Grassley:

During the hearings on S. 1847, held on February 25, 1982 you asked if we could provide you with amendatory language which would exempt from Congressional questioning the actions of judges when acting in a judicial capacity, i.e., in the selection and decision of cases.

We are pleased to enclose with this letter proposed language to achieve that result. Essentially, the amendment consists of adding the following underlined language to the current Section 3:

> "final year; provided, however, that actions of judges in selecting and deciding cases shall not be subject to review or oversight when Congress authorizes or appropriates funds for the Federal judiciary.

In our testimony we raised the potential problem of non-payment of salaries to federal judges due to the failure of Congress to enact an appropriations bill by October 1st, and suggested deleting "judges" from the salary language in Section 3. Upon reflection, we believe that suggestion may not be the most effective method to accomplish the desired goal. We have, therefore, enclosed a new purposed amendment which has as its sole purpose to avoid a constitutional problem in the event an appropriations bill is passed after the first of October.

It was an honor to be invited to give testimony on S. 1847 and to be asked to suggest possible amendments to that bill.

If we can be of assistance on this or any other matter, please do not desitate to call upon us.

Sincerely,

Edward H. Dowd
Director of Legal Research

Enclosure

NATIONAL
LEGAL CENTER
FOR THE
PUBLIC INTEREST

1101 17th STREET, N.W.
SUITE 810
WASHINGTON, D.C. 20036 202/296-1683

Purposed amendments to S. 1847

New Section 3

SEC. 3. For purposes of this Act, the term "Federal Judiciary" does not include the salaries of federal judges.

Former Section 3 is renumbered as Section 4 and is amended to read:

SEC. 4. Notwithstanding any other provision of law, no appropriation may be made for the Federal judiciary, including the payment of salaries of employees and the expenses of operation and maintenance, for any fiscal year beginning on or after October 1, 1982, except as specifically authorized by an Act of Congress with respect to such fiscal year; provided, however, that actions of judges in selecting and deciding cases shall not be subject to review or oversight when Congress authorizes or appropriates funds for the Federal judiciary.

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK
42 WEST 44TH STREET
NEW YORK, N. Y. 10036

COMMITTEE ON FEDERAL COURTS

HENRY A. BRACHTL
CHAIRMAN
747 THIRD AVENUE
NEW YORK, N.Y. 10017
(212) 759-1804

JAMES N. BENEDICT
SECRETARY
200 PARK AVENUE
NEW YORK, N. Y. 10166
(212) 972-7000

March 12, 1982

Hon. Robert Dole
Chairman
Senate Subcommittee on
Courts
United States Senate
Washington, D.C. 20510

Hon. Charles E. Grassley
Chairman
Senate Subcommittee on
Agency Administration
United States Senate
Washington, D.C. 20510

S. 1847, "Federal Judicial
Salary Control Act of 1981"

Dear Senators:

Pursuant to your request, we are writing to respond to three written questions that were submitted to us after we testified on February 25, 1982 with respect to the above captioned bill on behalf of the Committee on Federal Courts of the Association of the Bar of the City of New York. We understand that Questions 1 and 2 were posed by Senator Thurmond, and Question 3 by Senator Grassley.

The questions, and our answers to them, are as follows:

Question 1. In the opening paragraph of your testimony, you state that the proposed bill "raises serious Constitutional concerns". That statement is somewhat startling inasmuch as the inferior federal courts themselves are creatures of Congress and would have no existence absent statutory authority. It seems to me that your objections may be to the possibility of unwarranted questioning of judicial decisions rather than to an actual violation of the Constitution itself. Would you please comment on this statement from a Library of Congress memorandum prepared for the Committee on the Judiciary on this subject. The statement reads as follows:

> "The fact that such sensitive matters (inquiries into adjudicatory matters) could arise in connection with annual or periodic authorizations does not, however, prevent Congress from mandating annual or limited term authorizations in these areas. . . . In summary, despite conceivable problems along these lines,

there is no Constitutional objection to subjecting these and any other instrumentalities of the government to limited term authorizations."

In short, please explain in greater detail why you have apparently reached a different conclusion than that reached by the Library of Congress.

Answer 1. We have not had an opportunity to review the Library of Congress Memorandum which is referred to in Question 1. As discussed on pages 6-7 of our Statement, we are concerned that if enacted, application of S. 1847 might provide a vehicle for inappropriate and constitutionally impermissible questioning by Congress of judicial decisions in areas involving constitutional rights, under the threat that Congress might withhold program authorization if it disapproves of such decisions. If Congress cannot enact legislation adversely affecting a party's ability to vindicate a constitutional right, we question whether it can properly attempt to influence the adjudication of a case involving such a right by threats to withhold program authorization.

Our concern is not affected by the fact that Article III of the Constitution grants Congress the power to "ordain and establish" inferior federal courts. The history of Article III and contemporaneous writings of the Framers show clearly that the Federal Judiciary was intended to be independent of the political branches of government. The Framers believed that an independent judiciary was an essential safeguard to protect the constitutional rights of individuals from encroachment by the majoritarian branches of government.

Since S. 1847, if enacted, would pose the threat of Congressional curtailment of the constitutionally prescribed independence and power of the federal courts, we conclude that its adoption would be unwise as a matter of policy and might well result in violations of the principle of separation of powers that underlies our constitutional system of government.

Question 2. Although the public is frequently confused by the bifurcated authorization/appropriation

process, the main purpose of the process is to achieve programmatic review at the authorization level by the legislative or authorizing committee dealing with the subject matter and fiscal review by the appropriations committee, taking account of the overall fiscal program of the government. Why would the court system be disadvantaged by being made subject to programmatic review in the same manner as most other departments of government? What conceivable harm is done to the public interest by programmatic review of the budgets of the federal courts?

Answer 2. Question 2 assumes that at present, the degree of Congressional review of the Judiciary's budget is not substantially similar to the degree of Congressional review of the budgets of most other departments of government. We described in general terms the existing budget procedures with respect to the Federal Judiciary on pages 1 and 2 of our Statement.

To the extent, if any, that departments in the Executive Branch are subject to substantially different review by authorization committees dealing (in the language of Question 2) with the "subject matter" of programs, we question whether such subject matter review is appropriate with respect to the Federal Judiciary. First, the concept of program oversight makes sense with respect to agencies in the Executive Branch that have a substantive program to fulfill. In contrast, the Judiciary does not -- and should not -- have a substantive program to fulfill, except to decide cases in accordance with the Constitution and laws of the United States. And the reasoning of the Judiciary in the decisional process is not properly a matter for review by Congress.

Second, departments in the Executive Branch are not insulated by various constitutional provisions from scrutiny of their substantive operations. For example, no "Compensation Clause" protects the officers of such departments from reduction in their salaries; and they may be removed from office for reasons other than impeachment for and conviction of treason, bribery or other high crimes and misdemeanors. In contrast, the Judiciary is insulated in these respects -- indeed, the spirit of the doctrine of separation of powers and an independent judiciary mandate

such insulation. We think it is in the public interest to maintain the Judiciary's independence.

Question 3. I understand the necessity of an independent judiciary and the motives which prompt some of the positions taken in your statement, but in several respects you have taken novel, if not radical positions on the meaning of the Constitution. For example, on page 7, you imply that federal judges may not Constitutionally be excepted from the Executive Salary Cost-of-Living Act of 1975. Fortunately, that has already occurred as the result of the adoption of an amendment offered to H.J. Res. 370, the continuing resolution for Fiscal Year 1982 which subsequently became law. That amendment provides in essence that in the future, no federal judge can receive an increase in salary except as may be specifically authorized by some future Act of Congress. Are you contending that the amendment Senator Dole offered and which has become law is not Constitutional? If so, I would appreciate a full elaboration because the Constitution prohibits a decrease in pay but says nothing about mandating increases because of inflation. Are you implying that Congress does not have power to exercise its discretion in determining whether to increase judicial salaries, and if so, please cite the text of the Constitution which you believe is authority for that position.

Answer 3. The substance of Question 3 was posed by Senator Grassley at the Hearing and answered at the time. After the Hearing, we requested and received from the Subcommittee Staff the text of Senator Dole's amendment to H.J. Res. 370, which is a joint resolution appropriating funds, and a Statement made by Senator Dole upon introducing his amendment. Accordingly, we would like to take this opportunity to clarify and elaborate upon our views.

At the outset, we understand that Senator Dole's amendment may be of no continuing effect after the expiration of Fiscal Year 1982, which is the year affected by the joint resolution.

We note that Senator Helms' statement with respect to the cost-of-living pay increase provisions contained in S. 1847, which appears in the Congressional Record of November 12, 1981, is virtually in haec verba with Senator Dole's statement. Thus, the stated "purpose" of Senator Dole's amendment and S. 1847 with respect to such pay increases appears to be the same. These statements do not on their face reflect an intent to express disapproval of judicial decisions by withholding cost-of-living pay increases for federal judges. We certainly hope that that

is the case, although questions arise from the fact that S. 1847 would single out only federal judges from the automatic cost-of-living increase provisions contained in the Executive Salary Cost-of-Living Adjustment Act of 1975 (P.L. 94-82), which also applies to members of Congress and certain federal executive officers.

We believe that it not only would be inappropriate as a matter of policy for Congress to attack the decisional freedom of federal judges by discriminatory treatment of judicial compensation, but also that it might be constitutionally impermissible to do so. We have reviewed the Statements which were submitted by those who testified in support of S. 1847. We note their heavy reliance upon a Court of Claims decision, which they appear to suggest has resolved the constitutionality of legislation affecting cost-of-living pay increases for the Federal Judiciary. In our view, Atkins v. United States, 556 F.2d 1028 (Ct. Cl. 1977), cert denied, 434 U.S. 1009 (1978), has no such conclusive precedential value. On the contrary, the Atkins Court did not foreclose the possibility that an impermissible discriminatory motive may be established in a future case challenging such legislation. As the Court carefully noted:

> "...If discriminatory treatment is aimed at the judiciary by the political branches, to effect what is obviously an attack on the tenure or decisional freedom of the judges, it should not be assumed that article III does not mandate the fashioning of whatever relief is necessary to alleviate the situation. Consistent with the purpose of the Compensation Clause, as understood by the Framers and later by the Supreme Court, Congress should not be acknowledged to hold a financial 'instrument [with which] to attack [one's] independence as a judge.' Evans v. Gore, supra, 253 U.S. at 265, 40 S. Ct. at 557 (Holmes, J., dissenting)." 556 F.2d at 1049.

On behalf of the Committee on Federal Courts, we would like to thank you again for giving us an opportunity to express our views.

Respectfully,

Henry A. Brachtl
Lionel G. Hest

Senator Thurmond's Questions for Judge Hunter
and Judge Hunter's Answers

1. Judge Hunter, on page 20 of your statement, I notice you recommend revisions in 5 U.S.C. Section 5305 and 2 U.S.C. Section 356, both statutes which formerly permitted increases in pay for federal judges through certain automatic procedures. In view of the fact that those statutes have been mooted by the provision adopted in the continuing resolution which prohibits any increase in the pay of federal judges except pursuant to specific authorization enacted after the date of the enactment of the continuing resolution, I wonder if you still feel there is any need to revise those two statutes which have been repealed by implication insofar as they apply to federal judges?

Senator Thurmond, we are *not* recommending our own specific revisions in either 5 U.S.C. §5305 or 2 U.S.C. §356; we are merely recommending that, if *you* perceive a need to revise the process and procedures contained in those statutory provisions, you expressly amend them, rather than enact the language in section 4 of S. 1847. Section 4 of the bill contains language which merely appears clear and precise on its face, but which raises questions concerning its consequences that will probably lead to the Supreme Court having to resolve questions in a case decision not unlike the case decision which apparently motivated inclusion of section 4 in the bill. In a sense, Senator, we are simply advising you to more precisely do what you believe needs to be done, so that Congress' intentions are not ambiguous and subject to multiple interpretations.

We also believe you should take that precise course of action because we are not at all sure that the provision in the continuing resolution which you have cited (Amendment 626, See 127 CONG. REC. S 13373 (daily ed. Nov. 13, 1981)) does moot existing provisions in Titles 2 and 5 of the United States Code. We frankly are not at all certain that such a provision in a continuing resolution will retain any validity beyond the expiration date of the resolution's applicability. Titles 2 and 5 of the Code are positive law. Can provisions in those titles be effectively repealed by the language contained in Amendment 626? If that language is presumed to have an "open ended" consequence beyond the period of time covered by the continuing resolution, and if that presumption is challenged at law, the courts -- perhaps the Supreme Court -- will have to resolve the issue. We prefer to see such cases avoided rather than pressed to decision in Supreme Court opinions, and we suspect most Members of Congress share our view. If provisions in Titles 2 and 5 are a problem, we ask that you expressly and precisely repeal, amend, revise or otherwise correct those provisions, and clearly state your intentions.

2. As a practical matter, would it be desirable to modify the proposal before the Subcommittee so that this Subcommittee and Committee authorized the budget of the federal judiciary (excluding the Supreme Court) on a biennial or triennial basis? Would that procedure achieve the objective of greater programmatic oversight while obviating any remote possibility of the authorization process being abused for the purpose of influencing judicial decisions? In other words, would a biennial or triennial authorization better balance those interests?

Senator, as a practical matter, I believe the Judiciary Committee should leave the business of the Appropriations Committees up to the Appropriations Committees -- be that business conducted annually, biennially, at five year intervals or at any other interval. As I have stated in my prepared remarks, if *program* authorization -- which is quite distinguishable from *appropriations* authorization -- is the focus of concern, this Committee has an appropriate and traditional role -- and the Judicial Conference encourages this Committee to meet its oversight responsibilities in that context. We stand fully ready to cooperate, as we have for years. We very strongly recommend that you not perform that oversight responsibility in the context of a mandatory annual, biennial, or triennial procedure. The dangers in that procedure far outweigh the possible benefits. Actually, we see no benefit to tying us and you into any prescribed mandatory process. You now have full discretion to examine any matter you believe needs examination when you believe it needs it. We urge you to preserve your flexibility. We now feel we can seek your help whenever we need it. We urge you to preserve our flexibility. We believe traditional oversight procedures followed by the Senate and House Judiciary Committees are, if not presently fully adequate, potentially so with only minor adjustments in practice and procedure. We believe a statutorily mandated annual program authorization requirement -- or such a requirement scheduled with any finite performance period -- may, at best, all too easily impair the adequacy of oversight functions and, at worst, invite abuses of authority which may have Constitutional ramifications.

Senator Thurmond's Questions for Judge Bork
and Judge Bork's Answers

Q1. I appreciate very much your appearance before the Subcommittee today. As you know, Judge Bork, the authorizing process is a creature of the rules of the Senate and the House of Representatives. It is not mandated by the Constitution, but it is permitted by the Constitution in that each House is authorized to adopt its own rules of procedure. In effect, this proposal now before the Subcommittee could be accomplished either by statute, by concurrent resolution, or by a simple rules change in either body. There is at least one instance in the past in which the authorization process has been brought into effect by a simple rules change. For example, in 1976, a simple Senate resolution barred appropriation of funds for the Central Intelligence Agency, the Defense Intelligence Agency, and for various activities of the Departments of State and Defense and the FBI "unless such funds shall have been previously authorized by a bill or joint resolution passed by the Senate during the same or preceding fiscal year." Although that simple resolution applied only to the Senate, in practical effect, it applied to the Congress, and in 1977, the House adopted a companion requirement.

What recommendation would you make to the Senate if a floor amendment were offered to a bill, concurrent resolution, joint resolution, or simple resolution which stated simply that "it shall not be in order in the Senate to consider any appropriation of funds for the federal judiciary, except the Supreme Court, unless such funds shall have been previously authorized by a bill or joint resolution passed by the Senate during the same or in one of the next three preceding fiscal years.

Would that proposal balance sufficiently the concerns you have expressed with the problem addressed by the proposed legislation, namely, the lack of programmatic review of judicial fiscal activities.

A1. I think the amendment mentioned would be unnecessary because, as I understand it, there is already an annual appropriation authorization process. I should add that I am not a member of, and do not speak for, the Judicial Conference.

Q2. There may be some appeal in the Committee for increasing the period of authorization for the Department of Justice from an annual authorization to at least a biennial and perhaps a triennial authorization. If that sentiment were to prevail, would there not be a degree of logic and symmetry in authorizing the judiciary on an alternating biennial or triennial basis with the Department of Justice? In fact, from the point of view of the workload of the Committee, there might be some logic in authorizing the Patent and Trademark Office of the Department of Commerce one year for a three-year period, authorizing the Department of Justice the next year for a three-year period, and authorizing the courts the next year for a three-year period. Would you comment generally on the impact of that approach based on your experience both in the Department of Justice and your present position as a federal judge.

A2. I can be of little help with regard to this question. In the Department of Justice I had little experience with the authorization and appropriation process, and I have been a federal judge such a short time that I cannot estimate the impact of the approach described.

○